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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. **76-1168**

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA

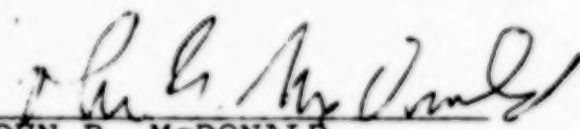
Petitioner,

-vs-

GEORGE WASHINGTON, JR.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT


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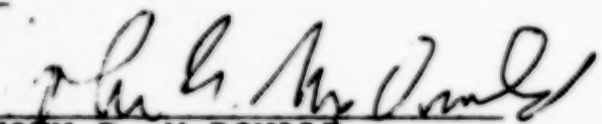

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JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 3, 1976. A timely petition for rehearing was denied on January 20, 1977 and the original majority opinion was amended at this time. This petition for certiorari was timely filed. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the reviewing court must look to the whole record and all the circumstances of the case rather than the specific finding of the trial judge in determining whether there was an abuse of discretion in declaring a mistrial so as to bar a retrial under the Double Jeopardy Clause.

2. Whether the trial judge must use talismanic words such as "manifest necessity", "ends of public justice" or "jury is improperly influenced by conduct of counsel so as to be unable to render an impartial verdict" prior to granting a mistrial so as not to bar a retrial under the double jeopardy clause.

3. After counsel argue as to possible alternatives to the granting

of a mistrial, i.e., jury admonition, is the trial judge required to make a specific finding as to his rejection of these alternatives or is this rejection implicit in the granting of a mistrial?

4. Where defense counsel intentionally engages in conduct calculated to necessitate a mistrial, should not the defendant be barred from raising a Double Jeopardy defense?

TABLE OF AUTHORITIES INVOLVED

Fifth Amendment to the United States
Constitution.

Rule 48 (c), Arizona Rules of the
Supreme Court.

Rule 314, Arizona Rules of Criminal
Procedure.

Udall, Arizona Law of Evidence, § 111.

[See Appendix].

STATEMENT OF THE CASE

The Appellee, George Washington, Jr., was charged with murder on February 1, 1971. Prior to trial the appellee moved for production of all Brady materials under Brady v. Maryland, 373 U.S. 83 (1963). The prosecution denied the possession of any Brady material. The trial began and the appellee was found guilty of first degree murder on May 21, 1971.

The appellee appealed to the Arizona Supreme Court where the case was remanded for a hearing on the Appellee's motion for a new trial. The trial judge granted the motion which was affirmed on June 20, 1974 by the Arizona Supreme Court.

On November 13, 1974, the Appellee Washington filed a motion to dismiss, in the Superior Court of Arizona, contending that the double jeopardy clause prohibited his re-prosecution and that he had been denied a speedy trial. On December 13, 1974, this motion to dismiss was denied.

The second trial began on January 7, 1975. During the voir dire of the jury the prosecutor informed the jurors that four years had passed since the commission of the crime and that the memories of witnesses were likely to fade. While explaining the ideas of impeachment and refreshing recollection, the prosecutor mentioned that the witnesses had been involved in "two prior proceedings." The defense counsel moved for a mistrial based on the reference to "two prior

proceedings" which motion was denied.

Defense counsel, in his opening statement, stated to the jury that in the first trial of George Washington, Jr., the Arizona Supreme Court had granted a new trial because the prosecutor had "suppressed and hidden evidence" and that this evidence had been "purposely withheld" from the defendant.

The State moved for a mistrial on the grounds that the highly prejudicial misconduct of defense counsel precluded any possibility of achieving a fair and impartial trial. The motion was denied although the court did express concern that the trial was becoming one of the County Attorney's office rather than of the defendant.

The State renewed its motion for a mistrial the following morning. Extensive argument was made by the prosecutor and the defense as to the effect of defense counsel's improper remarks on the jury and possible alternatives to the granting of a mistrial such as a cautionary instruction to the jury. The court granted the motion for the mistrial finding:

"Based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion and its effect for the reasons for the new trial, the motion for mistrial will be granted."

A petition for special action was filed by the Appellee before the Arizona Supreme Court on January 24, 1975, in which he claimed that the double jeopardy clause and the due process clause of the United States

Constitution barred a retrial of the Appellee. This petition for special action was denied on February 19, 1975.

The jurisdiction of the federal court was then invoked in the following manner. On April 4, 1975, the Appellee filed a petition for a writ of habeas corpus in the federal district court. This petition was held without further action until possible State remedies were exhausted. A motion to quash was then filed by the Appellee on May 5, 1975 based on double jeopardy in the Superior Court of Arizona. On June 16, 1975, Judge Ben C. Birdsall denied the motion to quash after oral argument. On June 26, 1975, the Appellee filed a petition for a writ of habeas corpus in the Arizona Supreme Court. This petition was

denied on July 14, 1975 after oral argument on the same double jeopardy issue. The Appellee then returned to the United States District Court for a writ of habeas corpus based on the double jeopardy issue which was granted on October 17, 1975.

On November 11, 1975, the State of Arizona appealed an order denying the State's motion to reopen evidence and the granting of the petition of writ of habeas corpus to the United States Court of Appeals for the Ninth Circuit.

On appeal, the Ninth Circuit agreed that the remarks made by the defense counsel were improper under Arizona law but found that the mistrial was improperly granted since no specific findings were made by the trial judge. The Ninth Circuit, in

affirming the Court below, held that "manifest necessity or ends of public justice" the test of United States v. Perez, 9 Wheat 579, 6 L.Ed.165 had not been met. The Ninth Circuit relied on United States v. Jorn, 400 U.S. 470 (1971) in reaching its decision.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Ninth Circuit Court of Appeals in the case at bar is in direct conflict with United States Supreme Court decisions as to the standards for the granting of a mistrial.

The test as to when there can be a new trial after a mistrial has been declared under the double jeopardy clause was stated by this Court in United States v. Perez, supra. The validity of a mistrial depends on whether in light of all the circumstances "there is a manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated." United States v. Dinitz, _____ U.S. _____, 96 S.Ct. 1075, 1079, 47 L.Ed.2d 267,

Illinois v. Somerville, 410 U.S.
458, 461, 35 L.Ed. 2d 425, 93
S.Ct. 1066; United States v. Jorn,
supra; Gori v. United States,
367 U.S. 364, 368-369, 6 L.Ed. 2d
901, 81 S.Ct. 1523; Wade v. Hunter,
336 U.S. 684 at 689-690, 93
L.Ed. 974, 69 S.Ct. 834; Simmons v. United
States, 142 U.S. 148, 153-154, 35
L. Ed. 968, 12 S.Ct. 171.

The holding of the Ninth
Circuit Court of Appeals in the
case at bar is contrary to the
test mandated by this Court.
Because the trial judge failed to
specifically state the basis for
his finding of "manifest necessity",
the Ninth Circuit Court of Appeals
held that the Perez, supra standard

had not been met and so the double jeopardy clause precluded a retrial of the Appellee. An analysis of Supreme Court case law will demonstrate that the Ninth Circuit Court of Appeals misapplied the mistrial test mandated by this Court.

In Illinois v. Somerville, supra, this Court upheld the trial judge's declaration of a mistrial as meeting the Perez, supra, "manifest necessity" test. In Somerville, supra, a defect in the indictment under Illinois law could have been asserted on appeal to overturn a final judgment of conviction. This Court held that the "ends of public justice" would be defeated by continuing the trial. In reversing the Seventh Circuit

Court of Appeals, the Court emphasized that rigid mechanical rules regarding mistrials would not be followed, but rather, a general approach premised on reasonable state policy was appropriate. 410 U.S. 458 at 429-430. The Ninth Circuit Court of Appeals refused to apply this holding in the case at bar.

The policy of the State of Arizona is to preclude any reference by counsel to evidence which has no bearing on the case in issue. Udall, Arizona Law of Evidence, § 111 at 201 (1960). Rule 48 (c), 17 A.R.S. Rules of the Supreme Court and Rule 314, 17 A.R.S. Rules of Criminal Procedure would have required the exclusion of the prior Arizona Supreme Court memorandum decision and evidence of alleged prosecutorial misconduct. In reliance on these

rules and the highly prejudicial quality of the defense counsel's remarks, the trial judge granted the mistrial. The Ninth Circuit Court of Appeals admits that the statements were improper, but held that since the trial judge neither (1) specifically ruled that the jury was prevented from arriving at a fair and impartial verdict nor (2) specifically found that no other alternatives were appropriate that the "manifest necessity" test had not been met.

This holding is clearly in conflict with Somerville, supra, where this Court stated that "a trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached..." 410 U.S. 458 at 464. Implicit in the trial judge's ruling was a finding that an impartial verdict could not be reached by the jury. Under Somerville, supra, if the trial judge reasonably could have concluded that the ends of public justice would be defeated by continuing with the trial then the mistrial must be upheld. Based on the trial record in the case at bar, the trial judge was certainly justified in granting a mistrial.

The trial judge in the instant case patiently listened to argument by counsel and obviously decided that

an impartial verdict could not be reached. The trial judge obviously decided that a cautionary instruction to the jury would not cure the prejudice and so declared a mistrial. This exercise of discretion was clearly within the mandates of Somerville, supra and Perez, supra.

The defense counsel in the instant case intentionally engaged in conduct calculated to necessitate a mistrial. In his opening statement defense counsel stated to the jury that in the prior trial the Arizona Supreme Court had ruled that the prosecutor had "purposely withheld" evidence. These statements were highly improper and not susceptible of proof. The statements were also irrelevant, incompetent and immaterial to the

issue of guilt or innocence of the defendant.

Where the intentional conduct of defense counsel necessitates a mistrial, the defendant should be barred from raising a double jeopardy defense. United States v. White, 524 F.2d 1249 (5th Cir. 1975). In United States v. Dinitz, ____ U.S. ____, 47 L.Ed.2d 267, 96 S.Ct. ____ (1976), the mistrial was granted by the trial judge based on the repeated misconduct of the defense attorney in his opening statement. This Court stated in Dinitz, supra, that so long as the record did not reflect bad faith conduct by the judge or the prosecutor, the trial judge's ruling would be upheld. Where the judge's action in banishing the defense attorney which led to the mistrial was based on the

the improper conduct of defense counsel a retrial of the defendant was proper.

The importance of excluding prejudicial conduct of counsel from the jury was succinctly stated by Mr. Chief Justice Berger in his concurring opinion in United States v. Dinitz, supra, where a mistrial was validly granted:

"An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing part to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intend-

ed to influence the jury
in reaching a verdict.

A trial judge is under a
duty, in order to protect the
integrity of the trial, to
take prompt and affirmative
action to stop such profession-
al misconduct." 47 L.Ed.2d
267, 276-77.

The Ninth Circuit in its decision
in the case at bar did not consider the
fact that defense counsel's intentional
conduct caused the mistrial. Under
Dinitz, supra, the trial judge should
have been upheld unless the reviewing
court had found that the mistrial ruling
was to harass the defendant or was
motivated by bad faith. Such conten-
tions have not been raised at any
level of these proceedings.

Gori v. United States, 367 U.S.
364, 81 S.Ct. 1523, 1 L.Ed.2d 901
(1961), is also instructive on the
finding of manifest necessity. In
Gori, supra, this Court upheld the

retrial of the defendant although the reason for the mistrial was not entirely clear. 367 U.S. 364 at 366.

The Ninth Circuit Court of Appeals specifically relied on United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), in holding that the trial court record in the case at bar failed to reveal a "scrupulous exercise of judicial discretion." 400 U.S. 470 at 484-5. However, the manner in which judicial discretion was exercised in Jorn, supra, differs substantially from the instant case. In Jorn, supra, the trial judge granted a mistrial, sua sponte, without hearing arguments from counsel and so, this Court concluded that there had been no effort by the judge to exercise a sound discretion. 400 U.S. 470 at 487. The State of Arizona sub-

mits that the Ninth Circuit Court of Appeals' reliance on Jorn, supra, in the case at bar was misplaced and contrary to Perez, supra, and Somerville, supra. This Court in Jorn, supra, looked specifically to the record to determine whether there was a proper exercise of judicial discretion.

"It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial." 400 U.S. 470, 487 (emphasis added.)

Jorn, supra, does not hold that a reviewing court may look only to the final order of the trial judge to make a determination if manifest necessity did in fact exist. The reviewing court must look to the record and the "circumstances surrounding the discharge of the jury." 400 U.S. 470 at 487. This, the Ninth Circuit Court of Appeals did not do. In Somerville, supra, this Court refused to accept the reliance on Jorn, supra, stating that:

"While it is possible to excise various portions of the plurality opinion to support the result reached below, divorcing the language from the facts of the case serves only to distort its holdings." 410 U.S. 458 at 469.

These conflicts between the Ninth Circuit Court of Appeals and Supreme Court justify the grant of certiorari to review the judgment below.

2. The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to when the granting of a mistrial will bar a retrial under the Double Jeopardy Clause of the Fifth Amendment.

Case law in the Second Circuit Court of Appeals is contradictory to the decision in the case at bar. In United States v. Potash, 118 F.2d 54 (2nd Cir. 1941), the appellants contended that double jeopardy must bar a retrial unless the reasons for discharging the jury before verdict were entered in the record. The appellants could cite no double jeopardy authority for their position and the

Second Circuit rejected their argument holding that the proper rule to be applied was whether or not the trial judge openly exercised his discretion in discharging the jury. 118 F.2d 54 at 54. The court looked to the stenographic minutes from which it could be inferred that only eleven jurors had returned to the court room and based on this inference held that the mistrial was properly granted. In Potash, supra, all that the trial judge had stated was that he was sorry "about the outcome of this" and that "under the circumstances" the only thing he could do would be to discharge the jury. 118 F.2d 54 at 55.

In the case at bar the inference as to why the jury was discharged is obvious from the record. The jury had been so potentially prejudiced by

defense counsel's highly improper remarks in his opening statement that they could not render a fair and impartial verdict. The ends of public justice demanded a mistrial. The reviewing court in the case at bar never found an abuse of discretion but instead relied on the fact that the trial judge did not make a specific finding of manifest necessity. Following Potash, supra, such a holding is erroneous because no reference to the record was made in order to infer why the mistrial was granted.

While there was no specific finding by the trial judge in the instant case that the statements were prejudicial, the statements were clearly prejudicial because they were in fact so improper that no specific finding by the trial judge was necessary. The Ninth Circuit found that defense counsel's remarks were improper, however, it erred in declining "to imply from this impropriety that the jury was prevented from arriving at a fair and impartial verdict." [Appendix App. 4 - 5].

The conclusion of prejudice the Ninth Circuit declined to imply is the only logical result after examining the record of counsel's arguments before the trial judge about the prejudicial affect of the defense counsel's remarks and possible alternatives to a mistrial.

The decision of the Ninth Circuit in the instant case is also directly contrary to the Fourth Circuit Opinion of Whitfield v. Warden of Maryland House of Correction, 486 F.2d 1118 (4th Cir. 1973), U.S. cert. den. 419 U.S. 876.

The Fourth Circuit refused to apply United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), and limited it to its particular factual context. The court in Whitfield was instead influenced by Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed. 2d 425 (1973), and Smith v. Mississippi, 478 F.2d 88 (5th Cir. 1973).

In Whitfield, the trial court and the attorneys were unsure as to whether or not a juror had

overheard motions for judgments of acquittal. The court declared a mistrial when one of the defense attorneys refused to agree to questioning of the juror as to the matter. The district court judge had held that a reprosecution would violate the double jeopardy clause because the trial judge "acted precipitously instead of scrupulously examining the necessity for mistrial" 486 F.2d 1118, at 1122. He emphasized that the trial judge should have interrogated the suspect juror and given more consideration to impaneling an alternate juror or severing the defendants. The Fourth Circuit rejected these arguments, stating that the trial judge was not bound to follow a particular course of

action. 486 F.2d 1118, at 1123.

The Fourth Circuit ruled that since the judge did not act sua sponte and listened to arguments of counsel as well as suggesting interrogation of the juror that his declaration of a mistrial satisfied the Perez test.

The Ninth Circuit decision in the case at bar is also in conflict with the Fifth Circuit opinion of Smith v. Mississippi, 478 F.2d 88, U.S. cert. den., 414 U.S. 1113.

The trial judge in Smith, supra, declared a mistrial due to the possible prematurely held opinion of a juror as to an important element of the case. The State made a motion for mistrial and after hearing argument as to the motion and the testimony of the juror who insisted that he had not

formed an opinion, the trial judge granted a mistrial. Although the trial judge did not "articulate with precision" his reasons for granting the mistrial, the Fifth Circuit said that the totality of the circumstances "would militate against the state receiving a fair and impartial trial." 478 F.2d 88 at 91.

The Fifth Circuit refused to rely on Jorn, supra, because in Jorn the trial judge made a sua sponte motion for a mistrial based on no inquiry whatsoever. The Court instead upheld the broad discretion of the trial judge, citing Gori v. United States, supra. In Gori, supra, this court held that although the trial judge was not clear as to his reasons for granting a mistrial, the discretion of the trial judge in so ruling would be upheld.

The Ninth Circuit Court of Appeals decision in the instant case by strictly applying Jorn, supra, rather than holding that the trial judge is not bound to follow a particular course of conduct, is a classic case of form being exalted over substance.

In United States v. White, 524 F.2d 1249 (5th Cir. 1975), the Fifth Circuit has held that where the mistrial is based on misconduct of the defense calculated to necessitate a mistrial the defendant is barred from relying on the double jeopardy clause to prevent his retrial. In the words of the court:

"This case is analogous to one in which the defendant moves for a mistrial or in which he engages in conduct calculated to necessitate a mistrial, knowing that such actions will result in the empanelling of another jury. In such a situation, where the mistrial is not attributable to prosecutorial or judicial overreaching, the defendant is barred from relying on a double jeopardy defense. United States v. Jorn, 400 U.S. 470, 485, 91 S.Ct. 547, 27 L.Ed. 2d 543 (1971); United States v. Dinitz, 5 Cir. 1974, 492 F.2d 53, 57, aff'd en banc, 504 F.2d 854, cert. granted, 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761 (1975); United States v. Beasley, 5 Cir. 1973, 479 F.2d 1124, cert. denied, 414 U.S. 924, 94 S.Ct. 252, 38 L.Ed.2d 158; United States v. Iacovetti, 5 Cir. 1972, 466 F.2d 1147, cert. denied, 410 U.S. 908, 93 S.Ct. 963, 35 L.Ed.2d 270; United States v. Romano, 5 Cir. 1973, 482 F.2d 1183, cert. denied sub nom., Yassen v. United States, 414 U.S. 1129, 94 S.Ct. 866, 38 L.Ed.2d, 753; McNeal v. Hollowell, 5 Cir. 1973, 481 F.2d 1145, cert. denied, 415 U.S. 951, 94 S.Ct. 1476, 39 L.Ed.2d 567." 524 F.2d 1249 at 1252. (Emphasis supplied).

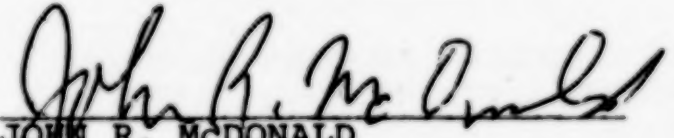
In the instant case defense counsel made extremely prejudicial statements to the jury intending to force a mistrial and so should be precluded from now asserting that the double jeopardy clause bars the retrial of the defendant. The Ninth Circuit did not consider in its holding the fact that the misconduct of defense counsel caused the mistrial. The State of Arizona contends that if this fact had been properly considered as it was in White, supra, and Dinitz, supra, by the Ninth Circuit a different decision would have been reached.

Based on the conflicts between the Ninth Circuit and other Circuit Courts of Appeal, the Writ of Certiorari to review the decision below should be granted.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted this 17
day of February, 1977.


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IN THE
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STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA

Petitioner,

-vs-

GEORGE WASHINGTON, JR.,

Respondent.

A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA,
W. COY COX, SHERIFF,
PIMA COUNTY, ARIZONA,
Appellants,

vs. No. 75-3634

GEORGE WASHINGTON, JR.,
Appellee.

GEORGE WASHINGTON, JR.,
Cross-Appellant,

vs. No. 75-3689

STATE OF ARIZONA,
W. COY COX, SHERIFF,
PIMA COUNTY, ARIZONA,
Cross-Appellees.

OPINION

[December 3, 1976]

Appeal from the United States
District Court District of
Arizcna

Before: MERRILL, KILKENNY and
ANDERSON, Circuit Judges:

Appendix A

KILKENNY, Circuit Judge:

This appeal concerns the propriety of a retrial of George Washington, Jr. [appellee] following the declaration of a mistrial in state court. The district court conditionally granted the appellee's petition for a writ of habeas corpus pending appeal to this court. We affirm and order the immediate execution of the writ.

FACTS

FIRST TRIAL AND APPEAL

The appellee was charged in the Arizona state court in February of 1971 with murder. Prior to trial, he moved for the production of all Brady¹ materials. When the prosecutor denied having any Brady material in his file, the trial commenced and the appellee was found guilty of first degree murder (May 21, 1971).

On appeal to the Arizona Supreme Court, the case was remanded for a hearing on appellee's motion for a new trial. At the end of the lengthy hearing, the trial judge granted the motion. On the state's appeal, this order was affirmed on which appeal the Arizona Supreme Court held that the suppression of the evidence was clearly prejudicial to the appellee and that a new trial was warranted.

¹ Brady v. Maryland, 373 U.S.83 (1963).

Subsequently, the appellee filed a motion to dismiss, contending that the double jeopardy clause prohibited his reprosecution and that he had been denied a speedy trial. This motion was denied on December 13, 1974.

SECOND TRIAL, MISTRIAL AND APPEAL

The voir dire for prospective jurors in the second trial began on January 7, 1975. During his voir dire, the prosecutor informed the veniremen that four years had passed since the commission of the crime and that witnesses memories were likely to fade. As an introduction to the notions of impeachment and refreshing recollection, the prosecutor further informed them that many of the witnesses had been involved "in at least two prior proceedings." Defense counsel moved for a mistrial out of the presence of the jury on the basis of, inter alia, the prosecutor's reference to these "two prior proceedings." This motion was denied. During his voir dire of the jury, defense counsel informed the prospective jurors that there had in fact been a prior trial and he asked them to disregard that fact.

The relevant remarks of defense counsel in his opening statement follow:

"You will hear that that evidence was suppressed and hidden by the prosecutor in that [first] case. You will hear that that evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case." [Emphasis supplied.]

Just after the noon recess, taken shortly after these remarks were made, the state moved for a mistrial on the ground that, inter alia, the defense counsel's allegations of prosecutorial misconduct were highly prejudicial and that the state could not get a fair trial. The court expressed concern that the proceedings were turning into a trial of the county attorney's office but, nevertheless, denied the motion.

The state renewed its motion the following morning before the jury was called. After argument by both sides concerning the propriety of defense counsel's mention of the Arizona Supreme Court's memorandum opinion, the court granted the motion, saying:

"Based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion and its effect for the reasons for the new trial, the motion for mistrial will be granted."

On January 24, 1975, the appellee filed a special proceeding in the Supreme Court of Arizona in which he claimed that retrial was barred by both the double jeopardy clause and the due process clause of the United States Constitution. The Supreme Court declined to accept jurisdiction.

On April 4, 1975, the appellee filed a petition for a writ of habeas corpus in the district court. The petition was granted on the ground that the record contained nothing to indicate that the state trial judge found "manifest necessity" for this grant of a mistrial.

From this ruling, and from an additional district court order denying the state's motion to reopen the evidence, all parties have appealed.

ANALYSIS

The constitutional standards for review in mistrial cases were first enunciated by Justice Story in United States v. Perez, 22 U.S. (9 Wheat) 579 (1824):

" . . . the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice

would otherwise be defeated."
Id. at 580.

The concepts of "manifest necessity" and the "ends of public justice" are thus firmly embedded in our constitutional history and are central to the solution of all double jeopardy inquiries. United States v. Sanford, U.S. (October 12, 1976), rev'g. 536 F.2d 871 (CA9 1976); United States v. Dinitz, 424 U.S. 600 (1976); Illinois v. Somerville, 410 U.S. 458 (1973).

The power to discharge a jury prior to verdict is discretionary with the trial court, but should be employed only "with the greatest caution, under urgent circumstances, and for very plain and obvious cause; . . ." Perez at 580. As stated in United States c. Jorn, 400 U.S. 470, 485 (1971):

" . . . the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option [to take his case to the original jury] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." [Emphasis supplied.]

In the absence of clear abuse, we are normally inclined to uphold discretionary orders of this nature. In the usual case, the trial judge has observed the complained-of event, heard counsel, and made specific findings. Under such circumstances, a mistrial declaration accompanied by a finding that the jury could no longer render an impartial verdict would not be lightly set aside.

The facts before us, however, reveal a dissimilar set of circumstances and no findings whatsoever. We agree with the state that the remarks made by defense counsel in his opening statement were improper².

²What the Supreme Court of Arizona said about the conduct of the county prosecutor has no relevance or materiality on the issue of the appellee's innocence/guilt. Furthermore, Rule 48 (c) of the Rules of the Supreme Court of Arizona provides that memorandum decisions ". . . shall not be regarded as precedent nor cited in any court except for the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case."

However, we decline to imply from this impropriety that the jury was completely prevented from arriving at a fair and impartial verdict.

If this was the case, the trial judge should have so found. He at no time, however, indicates the reason(s) why he granted the mistrial. Furthermore, his short order, quoted supra, is not susceptible to any inference that will fill this void. In the absence of any finding by the trial court or any indication that the court considered the efficacy of alternatives such as an appropriate cautionary instruction to the jury, we must conclude that neither of the tests of Perez ("manifest necessity" or "ends of public justice") has been met. We do not hold that these words are talismanic; we hold only that this particular record fails to reveal a "scrupulous exercise of judicial discretion," and that more consideration should have been given to the appellee's "valued right to have his trial completed by a particular tribunal." Jorn at 484-5. We have reluctantly concluded that the double jeopardy clause precludes a retrial of the appellee.

In view of our disposition of this issue, we need not reach the remaining issues advanced by the parties.

AFFIRMED.

MERRILL, Circuit Judge, with whom Judge Anderson concurs, concurring:

I concur with Judge Kilkenny but would like to emphasize the fact that a finding of manifest necessity was not implicit in the order granting mistrial.

The question to which such a finding is directed in a case such as this is whether misconduct was such as to prejudice the jury beyond remedy by a cautionary instruction or other means and thus preclude fair trial by that jury. It is not enough to find that certain conduct was improper. The critical question is the effect of that conduct upon the jury.

Here the greater part of argument on the motion for mistrial was devoted to the question of whether the remarks of defense counsel were improper - whether the Arizona Supreme Court decision could properly be brought to the jury's attention. When the motion for mistrial was first argued the judge, at one point, indicated that if the supreme court decision was not admissible in evidence, and reference to it was therefore improper, he was disposed to grant mistrial. At the conclusion of that argument mistrial was denied, because the court was not ready to rule on admissibility, but state counsel was invited to renew the motion at any appropriate time. The motion was renewed the following day and an Arizona rule of practice was, for the first time, called to the court's attention. It provided that on new trial reference could not be made to the

earlier trial. At the conclusion of argument mistrial was granted. While manifest necessity was also argued on this occasion, absent findings that manifest necessity existed, it is quite possible that the grant of mistrial was based on the fact that the impropriety of counsel's conduct had been established without reaching the question whether there could, nevertheless, be a fair trial.

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

STATE OF ARIZONA, W. COY COX)
SHERIFF, PIMA COUNTY, ARIZONA)

Apellants,

No. 75-3634

v.

GEORGE WASHINGTON, JR.,

Appellee,

No. 75-3689

GEORGE WASHINGTON, JR.,

Cross-Appellant,

O R D E R

v.

STATE OF ARIZONA, W. COY COX,
SHERIFF, PIMA COUNTY, ARIZONA,

Cross-Appellees.

Appeal from the United States
District Court, District of Arizona

Before: MERRILL, KILKENNY and
ANDERSON, Circuit Judges

The petition for rehearing is
denied.

Appendix "B"

The original majority opinion
filed December 3, 1976, is amended to
delete the word "completely" on line 3,
page 5.

The issuance of the mandate is
stayed for a period of 20 days from the
date of the filing of this order.

Appendix "B"

Office of the Clerk
United States Court of Appeals for
the Ninth Circuit

December 3, 1976

RE: C.A. No. 75-3634 GEO. WASHINGTON, JR.,
V. STATE OF ARIZONA

An opinion was filed and a
judgment entered in the above case today,
AFFIRMING the judgment of the court below
(or administrative agency).

You have (14) days, from the
above date, in which to file a petition
for rehearing.

The mandate of this court
shall issue (21) days after entry of
judgment unless the court enters an order
otherwise. If a petition for rehearing
is filed and denied, the mandate will
issue (7) days after the entry of the
order denying the petition.

Sincerely,

Emil E. Melfi, Jr.
Clerk of the Court

Appendix "C"

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

GEORGE WASHINGTON, JR.,)	
Petitioner,)	
	)	No: CIV. 75-85
	)	TUC (JAW)
vs.)	
	)	O R D E R
THE STATE OF ARIZONA)	
WILLIAM C. COX, SHERIFF)	
Pima County, Arizona)	
Respondent.)	
<hr/>		

The verified petition of petitioner, George Washington, Jr., for a writ of habeas corpus having been presented to the court, and a hearing having been had thereon, and it appearing to the court that the petitioner is detained by the respondent, The State of Arizona, William C. Cox, Sheriff, Pima County, Arizona, in violation of the provisions of the United States Constitution.

Appendix "D"

IT IS ORDERED that the petition of George Washington, Jr., for a writ of habeas corpus be and the same hereby is granted, and

IT IS FURTHER ORDERED that the execution of said writ shall be stayed until December 1, 1975, to enable the State of Arizona to appeal to the United States Court of Appeals for the Ninth Circuit.

DATED: October, 17, 1975.

James A. Walsh
United States District Judge

Appendix "D"

SUPREME COURT

State of Arizona

July 15, 1975

GEORGE WASHINGTON, JR.,)	
Petitioner,	)	Supreme Court
	)	No. H-688
v.)	
	)	Pima County
STATE OF ARIZONA, W. COY	)	No. A-18980
COX, SHERIFF, PIMA COUNTY,)	
ARIZONA,)	
)	
Respondent,)	
)	

The following action was taken by
the Supreme Court of the State of
Arizona on July 14, 1975, in regard to
the above-entitled cause:

"ORDERED: Petition for Writ of
Habeas Corpus = DENIED."

Clifford H. Ward, Clerk
By Mary Hopkins,
Deputy Clerk

Appendix "E"

IN THE SUPERIOR COURT OF THE STATE
OF ARIZONA
County of Pima, State of Arizona

BEN C. BIRDSALL
Judge

NO: A-18980
June 16, 1975

State of Arizona
Plaintiff

George Washington, Jr.
Defendant

MINUTE ENTRY

UNDER ADVISEMENT RULING

ORDERED that Defendant's Motion
to Quash is Denied.

Copies to:

county Attorney
Ed Bolding
Court Adm.
Pima County Sheriff

Marguerite B. Wade,
Deputy Clerk

Appendix "F"

SUPREME COURT

State of Arizona

February 13, 1975

GEORGE WASHINGTON, JR.,)	
Petitioner,)	
v.	)	Supreme Court
	)	NO. 11921
)	
SUPERIOR COURT OF THE)	
STATE OF ARIZONA, IN AND	)	Pima County
FOR THE COUNTY OF PIMA,	)	No. A-18980
AND THE HONORABLE BEN)	
BIRDSALL, PRESIDING JUDGE,)	
THE HONORABLE ALICE)	
TRUMAN AND THE HONORABLE)	
ROBERT BUCHANAN, JUDGES)	
OF THE SUPERIOR COURT,)	
PIMA COUNTY, ARIZONA,)	
Respondents,)	
and)	
THE STATE OF ARIZONA,)	
Real Party in Interest)	

The following action was taken by
the Supreme Court of the State of
Arizona on February 11, 1975, in regard
to the above-entitled cause:

"ORDERED: The Court declines to
accept jurisdiction of the
Petition for Special Action."

Clifford H. Ward, Clerk
By Mary Hopkins, Deputy
Appendix "G"

Rule 48(c), 17 A.R.S. Arizona Rules
of the Supreme Court provides:

"Dispositions as precedent.

Memoranda decisions shall not be regarded as precedent nor cited in any court except for the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case."

Rule 314, 17 A.R.S. Arizona Rules
of Criminal Procedure provides:

"When a new trial is granted, the new trial shall proceed in all respects as if no former trial had been had. On the new trial the defendant may be convicted of any offense charged in the indictment or information regardless of the verdict or finding on the former trial. The former verdict or finding shall not be used or referred to in evidence or argument on the new trial."

Udall, Arizona Law of Evidence,
§ 111 at 201 (1960):

"The first block of evidence ruled out is that which has no bearing on the matters in dispute in the trial, and therefore cannot aid the trier of fact."

Appendix "H"

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY
900 Pima County Courts Building
111 West Congress Street
Tucson, Arizona 85701
Telephone: 792-8411

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

NO. _____

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA

Petitioner,

-vs-

GEORGE WASHINGTON, JR.,

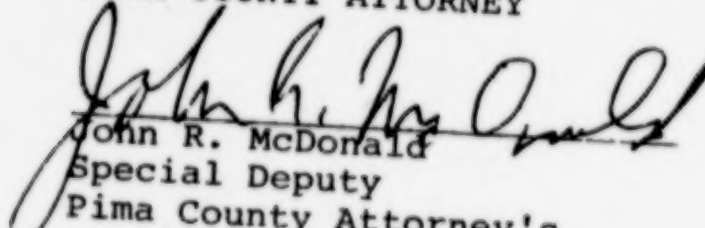
Respondent.

NOTICE OF APPEARANCE

The Clerk will enter my
appearance as Counsel for the
Petitioner.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By:


John R. McDonald
Special Deputy
Pima County Attorney's
Office
900 Pima County Courts
Building
111 W. Congress Street
Tucson, Arizona 85701

The Clerk is requested to
notify counsel of action of the
Court by means of letter.

JUN 20 1977

MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

No. 76-1168

STATE OF ARIZONA,
RICHARD BOYKIN, SHERIFF,
PIMA COUNTY, ARIZONA,

Petitioner,

v.

GEORGE WASHINGTON, JR.,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

Petition for Certiorari Filed
February 23, 1977

Certiorari Granted on April 18, 1977

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

No. 76-1168

STATE OF ARIZONA,
RICHARD BOYKIN, SHERIFF,
PIMA COUNTY, ARIZONA,

Petitioner,

v.

GEORGE WASHINGTON, JR.,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

Petition for Certiorari Filed
February 23, 1977

Certiorari Granted on April 18, 1977

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APPENDIX

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RELEVANT DOCKET ENTRIES

pertaining to
Case Nos. 75-3634, 75-3689;

George Washington, Jr.,

Appellant,

vs.

State of Arizona, William
C. Cox, Sheriff, Pima
County, Arizona,

Appellee,

in the

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PROCEEDINGS/FILINGS	DATE FILED
1. <u>Notice of Appeal</u> , filed by State of Arizona.....	10/31/75
2. <u>Notice of Cross Appeal</u> , filed by George Washington, Jr.....	11/25/75
3. <u>Motion to Dismiss Cross Appeal</u> , filed by State of Arizona.....	12/9/75
4. <u>Opposition to Motion to Dismiss Cross Appeal</u> , filed by George Washington, Jr.....	12/19/75

RELEVANT DOCKET ENTRIES (Continued)

5. Certified Transcript of the Record on Appeal, filed as of December 15, 1975 by the United States District Court for the District of Arizona....12/29/75
6. Motion to Supplement the Record on Appeal with Superior Court Transcript of Jury Trial, January 8, 1975, filed by the State of Arizona.....5/6/76
(Refiled by the State of Arizona.....7/9/76)
7. Brief, filed by George Washington, Jr.....5/7/76
8. Opposition to Motion to Supplement Record on Appeal, filed by George Washington, Jr.....5/12/76
(Refiled by George Washington, Jr.....7/12/76)
9. Reply Brief, filed by the State of Arizona.....5/24/76
10. Order, denying the Motion to Supplement the Record on Appeal because the material was not before Judge Walsh.....7/15/76
11. CAUSE ARGUED, submitted to Judges Merrill, Kilkenny and Anderson.....9/8/76

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12. Opinion filed..... 12/3/76
13. Petition for Rehearing, filed by the State of Arizona..... 12/17/76
14. Order denying Petition for Rehearing, amending Original Majority Opinion..... 1/20/77
15. Notice from U.S.S.C. re filing Petition for Writ of Certiorari, dated February 23, 1977.... 2/28/77
16. Order staying action on Motion by Washington for release on bail pending disposal by U.S.S.C. of Petition..... 3/24/77
17. Certified Copy of Order From U.S.S.C. granting Certiorari on April 18, 1977..... 4/25/77

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

ALICE TRUMAN
JUDGE, of the Superior Court

NO. A-18980

DATE: June 4, 1973

STATE OF ARIZONA,
Plaintiff

James Howard and
Jon R. Cooper
Plaintiff's Attorney

GEORGE WASHINGTON, JR.
Defendant

Robert Hirsh and
Ed Bolding
Defendant's Attorneys

MINUTE ENTRY

ORAL ARGUMENT ON DEFENDANT'S MOTION FOR
NEW TRIAL:

Defendant not present.
Joseph Trujillo reporting.
Messrs. Hirsh and Howard
argue to the Court.

IT IS ORDERED Defendant's motion
for new trial is granted on the grounds of
violation of due process and newly dis-
covered evidence.

/s/ Alice Truman
Judge

IN THE SUPREME COURT OF THE STATE OF ARIZONA

En Banc

STATE OF ARIZONA,)	
Appellant,	)	NO. 2408-2
vs.	)	MEMORANDUM
GEORGE WASHINGTON, JR.,	)	DECISION (Not
Appellee.	)	for Publication,
	)	Rule 48, Rules of
	)	the Supreme Court)

Appeal from the Superior Court of
Pima County

Honorable Alice Truman,
Judge

(Cause No. A-18980)

Filed June 20, 1974

Order Affirmed: Cause Remanded

Gary K. Nelson	
The Attorney General	Phoenix
and	
Dennis DeConcini	
Pima County Attorney	
By James M. Howard	
Deputy County Attorney	Tucson
Attorneys for Appellant	
Ed Bolding	
Former Pima County Public	
Defender	Tucson

John M. Neis
Pima County Public
Defender

Tucson

and
Robert J. Hirsh

Tucson

Attorneys for Appellee

HAYS, Chief Justice

On May 21, 1971, the defendant, George Washington, Jr., was found guilty by a jury of first degree murder.

Thereafter, the defendant moved this court for suspension of his pending appeal and for a new trial on the grounds that new evidence had been discovered. This court granted the motion to suspend the appeal and the case was remanded to the trial court for an evidentiary hearing on the motion for new trial. A hearing was held and a motion for new trial was granted on the grounds of violation of due process and newly discovered evidence. The state is now appealing this order pursuant to A.R.S. §13-1712(2).

The rule in effect in Arizona at the time of the alleged offense was Rule 311, Arizona Rules of Criminal Procedure, 17 A.R.S., which states in part that:

"A. The court shall grant a new trial if any of the following grounds is established, provided the substantial rights of the defendant have been thereby prejudiced:

. . .

"5. That the county attorney has been guilty

male, very heavy set, with a pot belly, no mustache, and sporting a big Afro hair style. Defendant is a much lighter weight Negro male with a crew cut and a mustache.

Hanrahan subsequently changed his story. However, the initial statements of Hanrahan which tend to absolve defendant from criminal liability were never disclosed to the defense counsel nor to the court.

There is no evidence more valuable to a defendant than the testimony of an eyewitness that he did not commit the crime in question. The prosecution has an affirmative obligation to assure that a defendant receives a fair trial. The suppression of evidence was clearly prejudicial to the defendant and a new trial was warranted.

Another rule in effect in Arizona at the time of the alleged offense was Rule 310, Arizona Rules of Criminal Procedure, 17 A.R.S., which states in part that:

"The court shall grant a new trial if any of the following grounds is established:

. . .

"3. That new and material

evidence, which if introduced at the trial would probably have changed the verdict or the finding of the court, is discovered which the defendant could not with reasonable diligence have discovered and produced upon the trial." (Emphasis added).

The requirements which must be satisfied before a trial court may grant a new trial on the basis of newly discovered evidence were defined in State v. Davis, 104 Ariz. 142, 449 P.2d 607 (1969). As a general rule, a new trial for newly discovered evidence will not be granted to permit the introduction of testimony of a witness whose identity was known by the moving party at the time of the trial. However, in addition to knowing the identity of the witness, the moving party must also have prior knowledge of the substance of the testimony of this witness. See State v. Ford, 108 Ariz. 404, 499 P.2d 699 (1972); State v. Propp, 104 Ariz. 466, 455 P.2d 263 (1969); State v. Maloney, 101 Ariz. 111, 416 P.2d 544 (1966).

In the case at bar, the new trial was properly granted. The defense counsel did not have prior knowledge of the substance

of the testimony of the witness because he testified that his information was discovered in an after-trial conversation with Hanrahan.

In State v. Turner, 92 Ariz. 214, 375 P.2d 567 (1962), this court set forth the requisites for compliance with the due diligence requirement:

"[T]he accused...must show by affidavit or testimony in court, that due diligence was used to ascertain and produce the evidence in time for use at his trial. He must account for his failure to produce the evidence by stating explicitly the details of his efforts to ascertain and procure it."
375 P.2d at 571.

The transcripts of the new trial hearing reveal the efforts of defense counsel to ascertain the nature and extent of Hanrahan's knowledge of the murder.

Furthermore, the transcripts also indicate that Hanrahan allowed himself both in the Pima County jail and in the courthouse to be "wired for sound" to allow the prosecution to listen and record a conversation between himself and defense

counsel. The purpose of the "wiring" was to record any commitments by defense counsel to Hanrahan in return for perjured testimony at trial. Hanrahan was monitored by the taping of a concealed microphone and a transmitter to his body.

It appears that any attempt by defense counsel to obtain information from Hanrahan would have been futile because of the close working relationship between Hanrahan and the government.

The primary issue at trial was the identity of the assailant. No one at trial identified defendant as the assailant. Thus, the direct eyewitness testimony of Hanrahan on the issue of the identity of the assailant, if offered at a new trial, would in no way be cumulative. Testimony as to the identity of the assailant is material for it would tend to disprove the commission of the crime by the defendant.

Appellant argues that the testimony of Hanrahan would not change the verdict because Hanrahan is not a very credible witness because of his numerous prior inconsistent statements. Appellant maintains that the jury would not be influenced by the testimony of one who will say anything

that suits his immediate interest.

However, this court has stated in State v. Mason, 105 Ariz. 466, 466 P.2d 760 (1970), that:

"The trial judge was in a much better position than we are to determine the weight to be given the affidavits and whether or not the testimony set forth in them would probably change the result in case of a new trial."
466 P.2d at 762.

It is well settled that an appellate court will not interfere with matters so peculiarly within the knowledge of the trial court unless an abuse of discretion existed. State v. Byrd, 94 Ariz. 139, 382 P.2d 555 (1963).

Therefore, we shall uphold the finding of the trial judge that the verdict would probably be changed by the testimony of Hanrahan.

The order of the trial court granting a new trial is affirmed and the cause remanded for further proceedings.

JACK D. H. HAYS, Chief Justice

CONCURRING:

JAMES DUKE CAMERON, Vice Chief Justice

FRED C. STRUCKMEYER, JR., Justice

LORNA E. LOCKWOOD, Justice

WILLIAM A. HOLOHAN, Justice

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

ALICE TRUMAN,
Judge,
of the Superior Court

NO. A-18980

DATE: December 13, 1974

STATE OF ARIZONA,
Plaintiff

Plaintiff's Attorney

GEORGE WASHINGTON, JR.,
Defendants

Defendants' attorneys

MINUTE ENTRY
UNDER ADVISEMENT:

The Court having taken this matter
under advisement, IT IS ORDERED the motion
to dismiss is DENIED.

cc: County Attorney
Bolding, Barber, Oseran & Zavala
Court Administrator
Mary Alice Martin

Cathy Hintzen,
Deputy Clerk

NOTATION

ORDER by the Supreme Court of
Arizona DECLINING TO ACCEPT JURISDICTION
of Washington's PETITION FOR SPECIAL
ACTION, dated February 13, 1975,

appears as Appendix G

to the Petition for Writ of Certiorari.

NOTATION

ORDER by the Supreme Court of
Arizona DENYING WRIT OF HABEAS CORPUS to
Washington, dated July 15, 1975,

appears as Appendix E
to the Petition for Writ of Certiorari.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA
(Civil Minutes - General)

Civil Case No. 75-85-Tuc.(JAW)
Title: GEORGE WASHINGTON, JR.

DATE: 10/2/75

vs.

STATE OF ARIZONA, et al

PRESENT:

HON. JAMES A. WALSH JUDGE

William G. Harris

David Lundy

Deputy Clerk

Court
Reporter

ATTORNEY FOR PLAINTIFF(S)

Ed Bolding

ATTORNEY FOR DEFENDANT(S)

A. Bates Butler, III

PROCEEDINGS:

ORDERED:

The Court can not find that the order

granting mistrial was based on any finding of any manifested [sic] necessity for granting mistrial, consequently a further trial of the defendant would be a violation of the double jeopardy provision.

In the matter of granting the Writ, the court makes a provision that the writ will be granted within 60 days unless the State, in that period, has made notice of appeal of this courts decision to the Ninth Circuit. If appeal is taken the Writ will not be issued until the disposition of the appeal.

NOTATION

ORDER by the United States District Court for the District of Arizona GRANTING WRIT OF HABEAS CORPUS TO Washington, dated October 17, 1975,

appears as Appendix D

to the Petition for Writ of Certiorari.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA,
W. COY COX, SHERIFF,
PIMA COUNTY, ARIZONA,

Appellants,

No. 75-3634

vs.

GEORGE WASHINGTON, JR.,

Appellee.

GEORGE WASHINGTON, JR.,

Cross-Appellant,

No. 75-3689

vs.

STATE OF ARIZONA,
W. COY COX, SHERIFF,
PIMA COUNTY, ARIZONA,

Cross-Appellees.

OPINION

(December 3, 1976)

Appeal from the United States
District Court District of
Arizona

Before: MERRILL, KILKENNY and
ANDERSON, Circuit Judges:

KILKENNY, Circuit Judge:

This appeal concerns the propriety of a retrial of George Washington, Jr., [appellee] following the declaration of a mistrial in state court. The district court conditionally granted the appellee's petition for a writ of habeas corpus pending appeal to this court. We affirm and order the immediate execution of the Writ.

FACTS

FIRST TRIAL AND APPEAL

The appellee was charged in the Arizona state court in February 1971 with murder. Prior to trial, he moved for the production of all Brady¹ materials. When the prosecutor denied having any Brady material in his file, the trial commenced and the appellee was found guilty of first degree murder (May 21, 1971).

On appeal to the Arizona Supreme Court, the case was remanded for a hearing on appellee's motion for a new trial. At the end of the lengthy hearing, the trial judge granted the motion. On the state's

¹Brady v. Maryland, 373 U.S. 83 (1963).

appeal, this order was affirmed on which appeal the Arizona Supreme Court held that the suppression of the evidence was clearly prejudicial to the appellee and that a new trial was warranted.

Subsequently, the appellee filed a motion to dismiss, contending that the double jeopardy clause prohibited his re-prosecution and that he had been denied a speedy trial. This motion was denied on December 13, 1974.

SECOND TRIAL, MISTRIAL AND APPEAL

The voir dire for prospective jurors in the second trial began on January 7, 1975. During his voir dire, the prosecutor informed the veniremen that four years had passed since the commission of the crime and that witnesses memories were likely to fade. As an introduction to the notions of impeachment and refreshing recollection, the prosecutor further informed them that many of the witnesses had been involved "in at least two prior proceedings." Defense counsel moved for a mistrial out of the presence of the jury on the basis of, inter alia, the prosecutor's reference to these "two prior proceedings." This motion

was denied. During his voir dire of the jury, defense counsel informed the prospective jurors that there had in fact been a prior trial and he asked them to disregard that fact.

The relevant remarks of defense counsel in his opening statement follow:

"You will hear that that evidence was suppressed and hidden by the prosecutor in that [first] case. You will hear that that evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case." [Emphasis supplied.]

Just after the noon recess, taken shortly after these remarks were made, the state moved for a mistrial on the ground that, inter alia, the defense counsel's allegations of prosecutorial misconduct were highly prejudicial and that the state could not get a fair trial. The court expressed concern that the proceedings were

turning into a trial of the county attorney's office but, nevertheless, denied the motion.

The state renewed its motion the following morning before the jury was called. After argument by both sides concerning the propriety of defense counsel's mention of the Arizona Supreme Court's memorandum opinion, the court granted the motion, saying:

"Based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion and its effect for the reasons for the new trial, the motion for mistrial will be granted."

On January 24, 1975, the appellee filed a special proceeding in the Supreme Court of Arizona in which he claimed that retrial was barred by both the double jeopardy clause and the due process clause of the United States Constitution. The Supreme Court declined to accept jurisdiction.

On April 4, 1975, the appellee filed a petition for a writ of habeas corpus in the district court. The petition

was granted on the ground that the record contained nothing to indicate that the state trial judge found "manifest necessity" for this grant of a mistrial.

From this ruling, and from an additional district court order denying the state's motion to reopen the evidence, all parties have appealed.

ANALYSIS

The constitutional standards for review in mistrial cases were first enunciated by Justice Story in United States v. Perez, 22 U.S. (9 Wheat) 579 (1824):

"...the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."

Id. at 580.

The concepts of "manifest necessity" and the "ends of public justice" are thus firmly embedded in our constitutional

history and are central to the solution of all double jeopardy inquiries. United States v. Sanford, ____ U.S. ____ (October 12, 1976), rev'g. 536 F.2d 871 (CA9 1976); United States v. Dinitz, 424 U.S. 600 (1976); Illinois v. Somerville, 410 U.S. 458 (1973).

The power to discharge a jury prior to verdict is discretionary with the trial court, but should be employed only "with the greatest caution, under urgent circumstances, and for very plain and obvious cause;..." Perez at 580. As stated in United States v. Jorn, 400 U.S. 470, 485 (1971):

"...the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option [to take his case to the original jury] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."

[Emphasis supplied.]

In the absence of clear abuse, we are normally inclined to uphold discre-

tionary orders of this nature. In the usual case, the trial judge has observed the complained-of event, heard counsel, and made specific findings. Under such circumstances, a mistrial declaration accompanied by a finding that the jury could no longer render an impartial verdict would not be lightly set aside.

The facts before us, however, reveal a dissimilar set of circumstances and no findings whatsoever. We agree with the state that the remarks made by defense counsel in his opening statement were improper.²

However, we decline to imply from

²What the Supreme Court of Arizona said about the conduct of the county prosecutor has no relevance or materiality on the issue of the appellee's innocence/guilt. Furthermore, Rule 48 (c) of the Rules of the Supreme Court of Arizona provides that memorandum decisions "...shall not be regarded as precedent nor cited in any court except for the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case.

this impropriety that the jury was completely prevented from arriving at a fair and impartial verdict. If this was the case, the trial judge should have so found. He at no time, however, indicates the reason(s) why he granted the mistrial. Furthermore, his short order, quoted supra, is not susceptible to any inference that will fill this void. In the absence of any finding by trial court or any indication that the court considered the efficacy of alternatives such as an appropriate cautionary instruction to the jury, we must conclude that neither of the tests of Perez ("manifest necessity" or "ends of public justice") has been met. We do not hold that these words are talismanic; we hold only that this particular record fails to reveal a "scrupulous exercise of judicial discretion," and that more consideration should have been given to the appellee's "valued right to have his trial completed by a particular tribunal." Jorn at 484-5. We have reluctantly concluded that the double jeopardy clause precludes a retrial of the appellee.

In view of our disposition of this issue, we need not reach the remaining

issues advanced by the parties.

AFFIRMED.

MERRILL, Circuit Judge, with whom Judge Anderson concurs, concurring:

I concur with Judge Kilkenny but would like to emphasize the fact that a finding of manifest necessity was not implicit in the order granting mistrial.

The question to which such a finding is directed in a case such as this is whether misconduct was such as to prejudice the jury beyond remedy by a cautionary instruction or other means and thus preclude fair trial by that jury. It is not enough to find that certain conduct was improper. The critical question is the effect of that conduct upon the jury.

Here the greater part of argument on the motion for mistrial was devoted to the question of whether the remarks of defense counsel were improper - whether the Arizona Supreme Court decision could properly be brought to the jury's attention. When the motion for mistrial was first argued the judge, at one point, indicated that if the supreme court decision was not admissible in evidence, and reference to it was therefore improper, he was disposed to

grant mistrial. At the conclusion of that argument mistrial was denied, because the court was not ready to rule on admissibility, but state counsel was invited to renew the motion at any appropriate time. The motion was renewed the following day and an Arizona rule of practice was, for the first time, called to the court's attention. It provided that on new trial reference could not be made to the earlier trial. At the conclusion of argument mistrial was granted. While manifest necessity was also argued on this occasion, absent findings that manifest necessity existed, it is quite possible that the grant of mistrial was based on the fact that the impropriety of counsel's conduct had been established without reaching the question whether there could, nevertheless, be a fair trial.

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

STATE OF ARIZONA, W. COY COX)
SHERIFF, PIMA COUNTY,
ARIZONA,)

Appellants.)

v.)

GEORGE WASHINGTON, JR.,)

Appellee,)

GEORGE WASHINGTON, JR.,)

Cross-Appellant,)

v.)

STATE OF ARIZONA, W. COY COX)
SHERIFF, PIMA COUNTY,
ARIZONA,)

Cross-Appellees.)

NO. 75-3634

NO. 75-3689

ORDER

Appeal from the United States District
Court, District of Arizona

Before: MERRILL, KILKENNY and
ANDERSON, Circuit Judges

The Petition for rehearing is
denied.

The original majority opinion filed December 3, 1976, is amended to delete the word "completely" on line 3, page 5.

The issuance of the mandate is stayed for a period of 20 days from the date of the filing of this order.

of misconduct.

. . .

"B. The court shall also grant a new trial when from any other cause not due to his own fault the defendant ~~has~~ not received a fair and impartial trial."

Defendant argues for a new trial on the ground that he was prejudiced by the deliberate suppression of evidence by the state.

On the issue of suppression of evidence, the United States Supreme Court has stated in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), that:

"[T]he suppression by the prosecution of evidence favorable to an accused. . . violates due process where the evidence is material to guilt or to punishment." 373 U.S. at 87.

In the case at bar, an alleged eyewitness named Hanrahan told the Tucson Police Department, the Pima County Sheriff's Department and the Pima County Attorney's Office that he had seen the murderer flee from the scene of the crime and that it was not the defendant. The murderer was vividly described by Hanrahan as a Negro

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

RELEVANT EXCERPTS

from the

HEARING ON WASHINGTON'S
MOTION FOR NEW TRIAL

April 30, 1973

May 1, 1973

June 4, 1973

April 30, 1973

[50-51]

CONTINUED DIRECT

BY MR. HOWARD?

Q. Mr. Cooper, why did you feel that it wasn't necessary to disclose this tape that has been marked in evidence under Brady versus Maryland?

A. I don't feel that there is anything at all on that tape that in any way is helpful to the defense or tends to absolve Goerge Washington from criminal liability. As a matter of fact, it is just to the contrary.

Q. Is there anything--did you have any reason to believe that Mr. Washington's lawyer was not aware of Mr. Hanrahan and what Mr. Hanrahan had actually observed?

A. No, quite to the contrary. I was outside the courtroom when Mr. Bolding walked up and talked to Mr. Hanrahan.

Q. Prior to May 13, 1972, did you have any knowledge whatsoever of Mr. Hanrahan's possible involvement or possibly, him possibly action--being a witness to the crime involved in this case?

A. No, I did not.

MR. HOWARD: I have no further questions.

MR. HIRSH: I have nothing further.

May 1, 1973

[300 - 314]

BY MR. HIRSH:

Q. Please state your name and occupation, please, sir?

A. William R. Stevens, Jr., Chief Criminal Deputy, Pima County Attorney's Office.

Q. And what was your employment, Mr. Stevens, in May of 1971?

A. I was employed in the same capacity.

Q. The Chief Deputy Criminal Attorney?

A. That's correct.

Q. What does that mean, sir?

A. The office is divided into a Civil Division and Criminal Division and I head the Criminal Division.

Q. And does that mean that you are in charge of all the criminal prosecutions that emanate from the Pima County Attorney's Office?

A. With the understanding, of course, as the County Attorney and Chief Deputy to be consulted, yes.

Q. Now, let me ask you, sir, we have heard some testimony about Ed Bolding being

investigated by your office--

A. Yes.

Q. Is that correct, sir?

A. I don't know what you have heard.

Q. Well--

A. I assume, yes.

Q. That's the testimony in this case--

A. All right.

Q. --is that correct, sir?

A. Yes, it is correct.

Q. And is that investigation continuing right now?

A. Not in an open sense, but yes, it is still, from what we had and what was developed, if there can be corroboration or additional information, yes, it would be.

Q. Now, was there such an investigation in May of 1971?

A. Yes.

Q. And when did the investigation of Mr. Bolding start?

A. I can't give you dates. I can only give you events.

Q. Who--well, can you give us some idea how long prior to May of 1971 such investigation existed?

Q. No, I don't believe there was--

Q. Can you tell us who headed the operation up or is that you?

A. I think it would be me.

Q. You were the head of the investigation?

A. I would say so.

Q. Sir, can you relate the basis for investigating Mr. Bolding or the basis that you had the spring of 1971?

A. I was made aware of a tape that was taken from a person by the name of Hanrahan, and I listened to that tape and to--

Q. I want to talk to you about that, but is that the first thing that came to your attention that caused your office to make an investigation of Mr. Bolding?

A. That's correct.

Q. There was nothing prior to that time?

A. That's true.

Q. And when you received this tape, and I understand you did get a tape from Deputy Sheriff Davis?

A. I don't--no, I think I first heard it with Rick Cooper.

Q. Rick Cooper told you about it?

A. Yes.

Q. You had no other information available to you or to your office about

any wrongdoing that Mr. Bolding had engaged in?

A. Totally, or in that case, or what are you talking about?

Q. Totally?

A. I would say I don't agree with some of the ways he practices law.

Yes, as far as an investigation, yes.

Q. You don't approve of some of the things he does in court--

A. True.

Q. --is that right?

A. In Court or while you are trying a case.

Q. Yes, but you had no information about him indicating that he was involved in any wrong doing of any kind?

A. No, not before that particular--

Q. Yes, sir. Now, how did you first hear about the existence of a tape that Hanrahan makes? Who first--

A. How did I first hear it?

Q. Yes.

A. To the best of my recollection, Rick Cooper came to my apartment and had the tape and I sat and listened to it.

Q. Rick Cooper had the tape?

A. That's correct.

Q. And do you know what day that is?

Q. No, I do not.

Q. Now did you make any reports about this matter at all?

A. No.

Q. Do you have notes in order to be able to refresh your memory to testify?

A. No.

Q. This is some time in May, though?

A. May of '71, yes.

Q. In the evening hours?

A. Yes.

Q. And did Cooper give you any additional information over and above playing the tape for you?

A. Yes, he told me--

Q. What did he tell you?

A.--how the information had come to his attention.

Q. What did he tell you about that?

A. I believe Mel Hill was at the jail and Hanrahan said something to him about, see that guy over there, or something to that effect, he is charged with a crime, and he did or didn't do it. I think it was he didn't do it, and then they talked to him and then he finally came out with

what was on that tape.

Q. Now, is that the extent of what Cooper told you?

A. No.

Q. Tell us what else Cooper told you?

A. I think at that time I was aware that Sergeant Bunting had continued the investigation since it was a Tucson Police Department case, and I'm pretty sure I knew that Bud Davis had been consulted in the case.

Q. Consulted in what capacity, sir?

A. I think he had arrested Hanrahan or had something to do with that before.

Q. Yes, So he was an officer working on the case?

A. No, I think it was more to them becoming aware of the information, turning it over to us.

Q. Was there anything else said by Cooper that night filling in as to the background of this thing?

A. Undoubtedly there was. That's to the best of my recollection.

Q. You have no further recollection at this time what was said?

A. I think we talked about what procedure we would follow and what we would

do from there.

Q. Did you and Cooper agree at that time to get Hanrahan in a situation where he could procure evidence against Bolding?

A. I don't think so.

Q. Wasn't discussed in any way?

A. Possibly, yes. I don't think we reached that agreement.

Q. You mean you might have discussed, had that discussion with Cooper that night?

A. It would not have been a situation of deciding that, it was talked about what would we do.

Q. I understand that, sir. Could it have been that that was discussed as one of the alternatives that night with Cooper--

A. Possible.

Q. --at your apartment?

A. Very possible.

Q. What is the next thing you did in the case?

A. Again, to the best of my recollection, I think I made the Chief Deputy aware of what was going on.

Q. And that was who?

A. Dave Dingeldine, and eventually the County Attorney, Mrs. Silver at the time.

Q. And what decisions did you make?

A. We debated for quite a long time on what would be the proper decision.

Q. Who is we, sir?

A. Myself, Dingeldine, Mrs. Silver.

Q. Yes.

A. What would be proper, and there were several things that we were heavily concerned with before we made any decision.

Q. What decision did you ultimately come up with?

A. That we knew we had an ethical responsibility under the cannon of ethics to disclose the existence of perjury or the possible existence of perjury, and we knew that we should come forward to the trial court, to the court, and advise them under the cannons but at the same time--

Q. Was that done, by the way, sir?

A. No, not to Judge Truman.

Q. Either before or after the trial of this case?

A. Not to Judge Truman. That was the thing that was bothering us.

Q. Why wasn't it done, why wasn't Judge Truman advised of this?

A. Because we felt that if this was not true and if Hanrahan was not being honest with us, it might be claimed that we were prejudicing Judge Truman, but yet we felt

we had to disclose this to the Court, so--

Q. You thought it might be--it would prejudice the trial judge who has hearings outside the presence of the jury and all sorts of material continually?

A. Legal prejudice, not actual prejudice, by any means.

Q. Legal prejudice in what way, Mr. Stevens?

A. If we came forward to Judge Truman and told her these things that we suspected and then they were groundless, it would obviously give grounds for some type of motion that we had done something improper.

Q. Mr. Stevens, why wasn't, after you found out that you could acquire no evidence against Mr. Bolding, after the taping had been concluded and Hanrahan had been wired on two occasions without any result, why was the trial judge at that time not advised as to what occurred?

A. Because you are leaving out numerous things that happened in the meantime, different advice that we sought and received. You can't answer that yes without all that.

Q. Well, can you give me any reason,

my question is, can you give me any reason why the trial judge was not advised after your efforts proved to be fruitless?

A. Because we felt at that time that we should go to the Presiding Judge and ask him would it be proper to go to Judge Truman at this time or should we hold off, and the Presiding Judge was not available, that would be Judge Robert Roylston, he was not available at the time, so we went to Judge Richard Roylston, told him what our problem was and asked did he think it was proper for us to go to Judge Truman and did he think it would be proper for us to continue our investigation.

Q. You talked to Judge Roylston prior to the making of both tapes?

A. There is three tapes or was.

Q. There were three tapes made between Bolding and Hanrahan?

A. We talked to Judge Roylston, after we had the tape that was brought to me first by Rick Cooper, to find out if the Judge felt there was anything improper in continuing to seek evidence of subornation of perjury or evidence of wrong doing. That was done before the second tape was made.

Q. Well, was Judge Roylston made aware of all of the instances where Hanrahan was wired and tapes were made?

A. Before they were done, yes.

Q. Was he advised of the results?

A. Yes, he was.

Q. Did you discuss with him whether or not Judge Truman should then be advised of the fact that you made an attempt and it proved to be fruitless?

A. I can't say for certain.

Q. Did you -- why did you not, after the trial, advise Judge Truman of what transpired?

A. I think we probably assumed, and this again, I'm not positive on, I think we assumed the testimony or whatever it happened to be would be transferred to Judge Truman by Judge Roylston, both the Roylstons, eventually.

Q. You made that assumption, Mr. Stevens?

A. Yes.

Q. But you never followed up with Judge Roylston to determine whether or not he had so advised Judge Truman, did you?

A. No, I did not.

Q. Did you ever contact the Bar Association and advise them of what transpired?

A. No, I did not.

Q. Now, Mr. Kashmar was the Public Defender at that time, was he not?

A. That's correct.

Q. Did you ever advise him of alleged wrong doings by one of his deputies?

A. Well, you are now going--trying to assume that its alleged wrong doings. We advised him of what had happened, yes.

Q. Well, your investigation proved to be fruitless?

A. No, the investigation proved to be inconclusive.

Q. Well, that's fruitless, is it not, sir?

A. Not sufficient evidence.

Q. Well, you weren't able to gain or acquire any evidence of Mr. Bolding's wrong doing, is that correct?

A. Can be answered yes.

Q. And this was a matter involving the wiring of a witness in a case in order to record conversations between that witness and a lawyer in the case?

A. That's correct.

Q. And after you were unable to acquire any evidence of wrong doing, you did not advise Mr. Bolding or his supervisor, Mr. Kashman--

A. That's not correct.

Q. Did you advise them?

A. Yes, we did.

Q. When?

A. Approximately two, three, four weeks after the trial.

Q. Who did you advise, sir?

A. Kashman.

Q. When, who so advised him?

A. I believe Dingeldine, myself, and possibly Rick Cooper. I don't know if he was there or not.

Q. You had a meeting with Kashman?

A. We did.

Q. Did you tell Kashman at that time that Hanrahan had been wired and that a but was placed on him and that in the course of conversations between Hanrahan and Bolding, that transmission of the conversation was being made to law enforcement officers.

A. I don't believe so.

Q. You didn't tell him about that at all, did you?

A. No.

Q. In fact, what you told him was that you had a tape from Hanrahan about allegations made against Bolding?

A. What we told him is what Han-

rahan had said to us on different occasions and what had happened on different occasions.

Q. You never made any report to Kashman of the bugging incident at all, did you?

A. I don't think we did.

Q. Let's get back to your decision to go ahead and wire Hanrahan. You say you arrived at this decision with Mr. Dingeldine and Mrs. Silver?

A. That's not what I said?

Q. Who arrived at that decision?

A. We determined from a recent case, I think it came out just before that, United States versus White, I think it is, about one person consenting, then there is no need for a search warrant, no need for legal action, if one person consents to it, but at the same time we were concerned about the possibility of a witness and an attorney, and that's why we went to Judge Royston to find out if he felt it would be proper.

Q. When you say, we went to Judge Royston, that's you and Mr. Dingeldine?

A. That's correct.

Q. And he told you that he thought

it was proper?

A. Yes, he did.

Q. And you then concluded that you were going to go ahead and do it?

A. That's correct.

May 1, 1973

[Pages 405-428]

MR. HOWARD: Nothing further, Your Honor. May Deputy Hill be excused?

MR. HIRSH: Subject to recall. I don't think we will need him, but I would like to have his number.

THE COURT: Subject to recall, you are excused. Please give your phone number and where you can be reached to the Clerk as you leave.

Would be mostly for in the morning because I don't think they'll need you again this afternoon.

We will take a short recess.

(RECESS)

MR. HOWARD: Call Sergeant Bunting.

LARRY BUNTING

having been called as a witness, was first duly sworn, and testified as follows:

DIRECT EXAMINATION

BY MR. HOWARD:

Q. State your full name and occupation, please, for the record.

A. Larry Thomas Bunting, police sergeant, City of Tucson.

Q. How long have you been employed

in that capacity by the City of Tucson?

A. Almost thirteen years.

Q. And to what duties are you currently assigned?

A. I'm in charge of what is called the investigative support detail. Investigate all homicides, suicides, death cases.

Q. Calling your attention to May of 1971, what detail or what duties were you assigned at that time?

A. The same.

Q. Were you involved, in early May of 1971, in the investigation and subsequent trial of a case involving George Washington, Jr.?

A. Yes, sir.

Q. And briefly, what was the nature of that case?

A. Had to do with the murder of James Hemphill, the clerk at the Arizona Hotel in Tucson.

Q. During the course of your investigation in that case, or during the course of the trial of that case, did you at one time or another become aware of an individual by the name of James Anthony Hanrahan?

A. Yes, sir.

Q. And when was the first time that you became aware of James Anthony Hanrahan in relation to this particular case?

A. It was while the trial was in progress. As I recall, was on the evening of the 13th of May, '71.

Q. And how did you become aware of James Anthony Hanrahan, what called your attention to him?

A. A phone call from Mr. Cooper.

Q. And after this phone call from Mr. Cooper, what did you do?

A. I went to the Pima County Jail, or Pima County Sheriff's office, actually, where I met with Mr. Cooper and Detectives Mel Hill and Bud Davis of the Sheriff's office.

Q. And after meeting with these three other individuals, what did you--or at that meeting, what was the discussion?

A. This concerned a discussion Hill had had with Hanrahan earlier that day in the jail concerning the suspect, Washington. Hill stated that it was his understanding that Hanrahan was going to be a witness for Washington, and as I recall, something to the effect that Hanrahan stated that Washington wasn't the man

responsible and he was going to testify to that.

Q. Okay. Did you then speak with George-- with James Anthony Hanrahan?

A. Yes, sir.

Q. And where did that occur?

A. This occurred in what is called the detective division in the Sheriff's office?

Q. And who else was present there?

A. Hanrahan, Hill, Davis, and myself.

Q. And where was Mr. Cooper at this time?

A. He didn't want to participate or get involved, so I don't know where he was.

Q. Where did you go, back into the jail to get Mr. Hanrahan, or who brought Mr. Hanrahan to the room, do you recall?

A. He was brought to the room. I don't recall who brought him.

Q. After he arrived in this room, did you have a discussion with Mr. Hanrahan concerning the case of State of Arizona versus George Washington, Jr.?

A. Yes, sir.

Q. Who did most of the questioning or discussing with Mr. Hanrahan concerning this case, yourself, Davis or Hill?

A. I did.

Q. And what was the nature of that

discussion, as close as you can recall?

A. As I recall, either Hill or Davis introduced me to him. They knew him previously, I did not, and explained that I was investigating the case which he was about to testify to. And I told him I was interested as to what he was testifying to, and he related that he was a resident at the Arizona Hotel when the murder occurred and that he was in his room and heard the blast and got up from shining his shoes, looked out his door and seen the suspect fleeing past him.

He stated it was a Negro male. He didn't know the subject. That he had bushy hair and that he was positive that George Washington was not the man who did it.

And that -- there was some discussion, I believe, on the length of the coat that the suspect had, and he said that the suspect had fled out the rear fire escape door from the second floor.

Q. And did you discuss this matter further with Mr. Hanrahan?

A. Yes, sir.

Q. What was the nature of the discussion from that point forward?

A. I explained to him that I had

investigated the case and that I was sure that there was another party involved, a small Mexican man by the name of Rodriguez, and that I hadn't located him yet and that eventually I would, and that probably, if I found out that he was not telling me the truth and perjuring himself, he could be in a bunch of trouble for perjury in a murder case.

And at that time he changed his story again.

Q. Then what was the story that he told at this point?

A. At this time he stated that he had, in fact, been in his room as he stated, and he was shining his shoes and he had heard the shotgun blast, got up and put his shirt on, looked out the door and seen the fire escape door close. That he did not really see a man. That actually he had gotten together with George Washington in the jail and discussed it briefly with him and then he had gotten, received a visitor--a visitor, an attorney whose name he didn't know, who had talked to him and agreed to make a deal with him. The deal was to be that he would testify that he had seen a person and he, although

he didn't know the person, that he was sure that the person was not George Washington.

Q. How did he refer to this attorney other than it being just an attorney?

A. As I recall, he stated he with a public defender, and later during the interview I asked for a description of him.

Q. Then when, in relation to what you have related to us here, was the tape recording made of Mr. Hanrahan's voice?

A. Approximately fifteen, twenty-five minutes after the introduction that I had talked with him, and then we went through the change in his story again. And then we took a taped statement from him.

Q. Show you what has been marked as Defense Exhibit A and ask you to examine that, if you will.

Does that bear any mark that you can recognize?

A. Yes, sir.

Q. Where is that?

A. Bears my initials, LTB.

Q. And is this the tape that we are referring to?

A. Yes, sir.

Q. The second story that Mr. Hanrahan related to you on the early evening of the

13th, the story that you--that is related to this tape recording?

A. Yes.

Q. Did you later have occasion to determine what attorney Mr. Hanrahan was talking about?

A. Not I, myself. I was told who the attorney was.

Q. Did you have occasion to determine whether or not Mr. Hanrahan was, in fact, staying at the Arizona Hotel at the time that the murder of Mr. Hemphill occurred?

A. Yes, sir. He was.

Q. During the course of your interview preceding the taping on the 13th of May, 1971, did you make any promises to James Anthony Hanrahan concerning his testifying or concerning giving a statement in the case of George Washington, Jr.?

A. No, sir.

Q. Did you threaten Mr. Hanrahan in any way during the course of this interview preceding the taped portion?

A. No, sir.

Q. Did anyone else in your presence, sir, promise anything to Mr. Hanrahan with regard to giving a statement in the case of George Washington, Jr.?

Q. Let me ask specifically, did Detective Davis, in your presence, threaten Mr. Hanrahan in any way or make any promises to him?

A. No, sir.

Q. How about Detective Hill, did he either threaten Mr. Hanrahan or make any promises to him with regard to making that taped statement?

A. No, sir.

Q. Had Detective Davis or Detective Mel Hill been involved in the investigation of the State of Arizona versus George Washington, Jr. case prior to this time, the 13th, 15th of May--13th of May, 1971?

A. No, sir.

Q. To your knowledge, did they know any of the facts of that particular case prior to this interview?

A. I don't know what facts they may have known.

Q. Did they, in this interview, discuss the facts of the case with Mr. Hanrahan or did--was it exclusively you discussing the facts in the case with Mr. Hanrahan?

A. I did practically all of the talking. I don't recall Davis or Hill saying hardly anything. I recall Davis just telling

him, calling him by name and just saying, be honest and tell the truth, urging him to be honest about it.

Q. After you had taken the taped portion of the interview, had tape recorded it, what occurred, what did you do?

A. Well, we left and got together with Mr. Dingeldine, and the tape was played to him. And then we called it quits for the evening.

Q. From that point forward, Sergeant Bunting, did you become involved in an investigation of Mr. Bolding with regard to what Mr. Hanrahan had said?

A. No, I didn't actively participate in the investigation.

Q. Why were you not involved directly in the investigation of Mr. Bolding?

A. Well, after we left we had some discussion, I believe in the presence of Mr. Dingeldine, and it was decided that the County Attorney's Office would be the investigating agency, and I wasn't particularly anxious to get the Police Department involved in that type of investigation.

Q. Did you, after this interview with Mr. Hanrahan, this original interview, did you ever have any other additional

interviews with Mr. Hanrahan concerning the case?

A. No, sir.

MR. HOWARD: No further questions at this time.

CROSS-EXAMINATION

BY MR. HIRSH:

Q. You have a report on this matter, Mr. Bunting?

A. No, sir.

Q. Where is your report?

A. I have no report, sir.

Q. You made no notes at all of this discussion you had with these people on May 13th?

A. That is correct.

Q. Why not, sir?

A. It was all on tape.

Q. Well, it wasn't all on tape, though.

A. The meat of the matter was on tape.

Q. Well isn't--Bud Davis tells us that you four were together for thirty minutes before that tape was made. Does that sound correct to you?

A. I don't recall how long we were together before.

Q. Could that be correct?

A. Could be.

Q. That was the sworn testimony here, that the four of you were together for thirty minutes before the tape was made?

A. I don't recall the time.

Q. You wouldn't disagree with what Bud Davis says in that regard?

A. I think thirty minutes is a little bit long. I wasn't watching my watch. I would say--I believe I stated fifteen to twenty minutes; twenty-five minutes.

Q. The tape is about five to seven minutes long, you got about seven minutes worth of tape that you recorded this particular evening.

A. Are you asking a question or making a statement sir?

Q. That's my question to you, isn't that about correct?

A. I didn't time it.

Q. Well, sir, what you are doing now is relying entirely on bare memory to tell us what happened for the, at least as you say, fifteen to twenty minutes prior to taking that taped statement?

A. That is correct.

Q. You would agree with me, sir, that it is a good police practice for a detective investigating a case to make notes in order to make a written memorial of the things

that transpired?

A. I would agree.

Q. That is a sound and accepted police practice, is it not?

A. It is.

Q. And it enables the detective or an investigating officer to have a memorial in order to enable him to have a record to testify at a later time, or to refresh his recollection at a later time?

A. That is correct.

Q. There were no notes of this made by any of the detectives, to your knowledge, during this time, prior to the time the tape was made.

A. I did not make any notes, no sir.

Q. Sir, you never heard of Jim Hanrahan prior to this time?

A. I had not.

Q. You had been outside the courtroom, or were you inside the courtroom during the, at least the first few days of this case?

A. I was outside.

Q. Were you the head officer on the case?

A. Yes.

Q. You knew that Washington's lawyer was Ed Bolding?

A. Yes, sir.

Q. You knew, when there was a statement made by Hanrahan that Washington's lawyer came down and talked to him, that it was Ed Bolding, did you not?

A. He didn't know the man's name and I didn't know for sure it was Ed Bolding.

Q. Well, you certainly had a guess that it was Ed Bolding, did you not?

A. Yes. It was a guess, but not a fact.

Q. Well, let me ask you this, sir, did you have any discussion with any of those people as to what was going to be done or what should be done with respect to Bolding?

A. Yes, sir--wait who are you talking about now?

Q. I'm talking about the folks that were down at the Sheriff's department on May 13th.

A. You, and Mr. Cooper and--

Q. Yes, sir.

A. Yes, sir.

Q. Who participated in that discussion?

A. Cooper, Hill, and Davis and myself.

Q. Was Hanrahan sent back to the jail at that point?

A. Yes, sir. He was already gone.

Q. Tell us about the discussion you

already had.

A. Well, there was talk about what we were going to do with this particular situation, how it was going to be handled, who was going to make the investigation, was there enough evidence to substantiate the charge.

Q. Right then and there?

A. That is correct.

Q. What else did you talk about?

A. That is pretty much it, talking about why would Bolding do it and so forth?

Q. Did you talk about wiring Hanrahan up that night, was that part of the discussion?

A. I don't recall if that was discussed that night. I know at a later time he was wired.

Q. Well, do you recall any discussion with any prosecuting official, including investigators or members of the County Attorney's staff or Sheriff's Deputy, about wiring Hanrahan?

A. I don't recall that night, no.

Q. You don't recall ever hearing any such conversation?

A. I was present--I knew it was going to be done and who was doing it.

Q. Who told you about that?

A. I don't recall if--

Q. Cooper?

A. --Mr. Cooper told me, or who told me, I just knew that it was going to be done.

Q. Someone advised you that it was going to be done. You didn't participate in the decision making in that regard?

A. I may have participated in the decision making as to whether the police department was going to do it or the County Attorney was going to do it.

Q. Well, after Hanrahan gave you a taped statement, was he immediately sent back to the jail? In other words, is the termination of that tape that we heard, the tape that is at least marked for identification, did that terminate Hanrahan's conversation, or did you continue all of that, had further conversation with Hanrahan?

A. I believe there was a short conversation as, we'll be in touch with you later on.

Q. About what?

A. About what to do with, so forth.

Q. Who told Hanrahan that they would

be in touch with him?

A. I don't really recall that.

Q. Did you tell him that?

A. I may have.

Q. Why would you be in touch with him, sir?

A. Because I was interested in the case.

Q. In which case?

A. The murder case and also the case, the possible case involving Bolding.

Q. You mean you might participate in that case also?

A. I was considering it, yes.

Q. What else did you tell Hanrahan, or what else did Hanrahan tell you after the tape was terminated?

A. I don't recall any further conversation.

Q. Now, when did you check out to determine whether Hanrahan was, in fact, in the hotel, when did you do that?

A. I'm not sure. I believe it was the following day.

Q. And you found that he was?

A. Yes, sir.

Q. What else did you check out about what Hanrahan said, anything else?

A. That's all, as I recall.

Q. That is the sum and substance and total of what you checked out with respect to what he said, is that correct?

A. That is, to the best I can recall, yes, sir.

Q. Anybody ever suggest they give Hanrahan a lie test, was that ever suggested or talked about?

A. I don't believe that was talked about in my presence, sir.

Q. Well were prosecuting--you were the head man in the case?

A. Head Investigator.

Q. You were charged with the investigation culminating in the arrest and prosecution of this man, George Washington?

A. That's right.

Q. You weren't about to accept any statements by anybody that George Washington wasn't the man, isn't that a fact, when you think back on it, being candid about it and looking at your position, you weren't about to accept a statement from some con in the jail that George Washington was not the guy responsible for the commission of this crime?

A. Well, I wasn't about to accept it

without asking him about it.

Q. Well, what did you ask him, sir, other than tell him that it is a very serious offense to commit perjury in a homicide prosecution?

A. That is just about it.

Q. That is just about all you said. Did you tell him what the penalties for perjury were?

A. No, I don't even know what the penalty--

Q. You know it is time in the Arizona Penitentiary, means a stay behind bars?

A. I know. It is a felony, yes.

Q. How long does it take Hanrahan to tell you this story that, at least the first version, that Washington was not the man, three minutes?

A. Three or four minutes.

Q. That's the first thing he told you?

A. Right.

Q. Correct?

A. Yes, right.

Q. And then you proceed to tell him that someone else is involved in this?

A. That is correct.

Q. Did you ask Hanrahan whether he was involved in it?

A. That's correct.

Q. You had not even a suspicion that he was involved in the case other than the fact that he was at that hotel and now incarcerated at the Pima County Jail?

A. That's true.

Q. Isn't that true?

A. But it didn't violate anything to ask him if he was involved?

Q. Well, it did, sir, to intimidate him, because he got very nervous after that, didn't he?

A. He got nervous after I talked about perjury, yes.

Q. Got nervous after you asked him whether he was involved in this too, did he not?

A. After I had pointed out another possibility of a suspect, he got pretty nervous, yes, sir.

Q. Did you ask him whether he had a lawyer?

A. No, sir.

Q. Did you ask him--tell him that he had a right to a lawyer at the time of this interview?

A. No.

Q. Didn't discuss him having a lawyer

at all or representation for him at all?

A. No, sir.

Q. What else did you talk about during that fifteen to twenty-five minutes, Mr. Bunting, that you haven't told us about?

A. Well, after he told the second story the only additional thing I can recall that we talked about was, after he laid it out about the attorney, I told him I wanted to be very sure that he was telling the truth because you knew it could possibly jeopardize somebody's career.

I mean, that's kind of a serious thing to lay out.

Q. Why sure. Why didn't you give a lie test before you had that man wired, before, you, quote, jeopardized somebody's career?

A. As I said earlier, after this taped statement, Cooper, Hill, and us got together, and--

Q. To discuss what to do?

A. And decided that Tucson Police Department would not do the investigation.

Q. Mr. Bunting, you had all the facts available to you as to what happened in the homicide when you talked to Hanrahan that night, didn't you?

A. Yes, sir.

Q. And Hanrahan gave you one version,

you talked to him about perjury, you asked him whether he was involved and then you tell us the story changed?

A. That is correct.

Q. You talked to him about the facts as he told you; had the story changed, did he not?

A. I talked to him about the facts of the case,--

Q. Sure.

A. --people involved. Yes, sure.

Q. Sure. You discussed that with him before that taped statement was made--

A. Sure.

Q. --didn't you, and that was discussed in the presence of Hill and in the presence of Bud Davis?

A. Sure.

Q. And he would tell you something and you would say something about the facts?

A. No. It wasn't him saying, and me saying, no that is not right, it was, he told a story, I pointed out some facts. The stories switched around, and that is it.

Q. You pointed out some facts and you discussed this fact with Hanrahan, and finally when they were settled upon, you took

a taped statement from him and that is what happened, is it not?

A. After he said that this was the truth, we took a taped statement.

Q. After you and Hanrahan settled on the facts after you discussed the facts?

A. As he related them to me, yes, sir.

MR. HIRSH: That's all I have. Oh, just one question.

Q. (By Mr. Hirsh) Do you have any idea where these tape recordings of--involving Ed Bolding and Jim Hanrahan are?

A. Only tape I know about is that one over here.

Q. Well, you heard them, didn't you sir?

A. No, sir.

MR. HIRSH: Could I have a minute, please.

Q. (by Mr. Hirsh) You have no idea as to the whereabouts of these missing tape recordings where--when Hanrahan was bugged and transmitted the conversations between Bolding and himself?

A. I have never seen them. I have never had them. I don't know.

Q. Have no idea of their whereabouts

at this time?

A. No, sir.

MR. HIRSH: That's all I have, sir.

June 4, 1973

[507]

"THE COURT: I have thought a lot about this case. I have read the memorandum filed by the defense. I didn't receive a memorandum from the County Attorney until this morning.

However, in listening to Mr. Howard's argument, I don't feel there is anything new in there that requires me to study it.

So at this time I am going to grant the motion for a new trial on the grounds of violation of due process and newly discovered evidence."

* * * * *

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

RELEVANT EXCERPTS

from the

HEARING ON WASHINGTON'S
MOTION TO DISMISS

November 26, 1974

December 2, 1974

December 4, 1974

November 26, 1974

[Page 22-23]

Q. [Mr. Bolding] All right. During that time, isn't it true that you, and in the presence of Mr. Cooper, indicated to me that Rodriguez was going to identify George Washington as being the man who did the job?

A. [Larry Bunting] No, I think what is confusing you is sometime after--during the motion for a new trial, sometime after, I remarked to you, on a number of occasions, next time, Ed, we are going to have a better case because I have located a witness; is that not correct?

Q. You probably have told me that kind of information, but what I am talking about is back at the time of the trial in 1971, May of 1971, and before--between December--between the preliminary hearing and May of 1971, is it your testimony that you did not tell me, indicate to me that Rodriguez was gone, but when you found him, he was going to identify George?

A. I don't recall.

Q. Do you deny that?

A. I don't really recall any conversation. I may have said it and I may

not have. There is--

Q. That's--

A. There is a number of times I talked to you when I really don't tell you the truth.

Q. Okay.

A. When I am not on the stand.

Q. All right.

MR. BOLDING: I think that is probably indicated by the testimony, and I have no other questions.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

ENTIRE HEARING

on

WASHINGTON'S REQUEST FOR

WRIT OF HABEAS CORPUS

Before the

Honorable James A. Walsh

October 2, 1975

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GEORGE WASHINGTON, JR.,	}	NO. CIV 75-85 TUC (JAW)
Petitioner,		
vs.	}	Tucson, Arizona
STATE OF ARIZONA, et al.,		
Respondents.		

TRANSCRIPT OF PROCEEDINGS

Before: The HONORABLE JAMES A. WALSH,
U.S. District Judge

(The clerk calls the case.)

THE COURT: Good morning, gentlemen.

MR. BOLDING: Good morning, Your Honor. Are you ready for me? Did you have something -- I thought that you were about to say something else.

THE COURT: No, I was not going to. I have already mentioned to Mr. Butler that I don't have here, in what was brought over, sent over from the clerk's office, the testimony of Jon R. Cooper on the motion to dismiss, December 2nd and 4th, 1974, and he had given me or phoned over a mention of three parts of the record that he wanted my attention directed to, and among them was this transcript of Jon R. Cooper's testimony, and it isn't here.

MR. BUTLER: Judge, after we leave here this morning, I will secure a copy of that testimony, either the original or a copy and Xerox whatever I have and bring it over.

MR. BOLDING: I have the transcript also, Your Honor, which I could leave, or I have some copies.

THE COURT: Well, I will let counsel

proceed as they feel they want to in this matter now.

MR. BOLDING: Thank you, Your Honor. As Mr. Butler and I have discussed already this morning, this is somewhat of a rehashing insofar as we are concerned because we have been here before, not to this Court, but this type of argument has been made with the Arizona Supreme Court, and so I may skip over some thing that might be of importance to this Court. I hope not. But in my remembering, I may feel, well, I have said this to you before.

What we are asking for, Your Honor, is specifically set out in our motion, in our application for the writ. We feel that just plain and simply out of a need for fairness to Mr. Washington that this writ, this application should be granted and Mr. Washington, the charges against him should be dismissed.

He is still in the Pima County Jail where he has been since January 8, 1971, all without due process, in that he has never been fairly convicted, never been convicted with the use of all evidence available, with the use of evidence that

should have been given to George and his lawyer at the time of the first trial, and this is all basically that we are asking for, that justice be done and that fairness prevail.

The Court, from reading the memos, I know, has put together the chronology of the incident, and I will need to refer to it a little bit in talking with you this morning, or in asking you for the relief that we feel we are entitled to.

James Hemphill was shot in December of 1970. The testimony from the previous trial which was held in about May of 1971 will show or did show that on the night that James Hemphill was shot, George Washington, Jr., was taken into custody, on that very night. He was arrested close by the scene, about an hour after the shooting. He was taken to the police station. He was subjected to a one-man showup with one of the witnesses. The eyewitness said, "No, that's not the man." George was released.

Later in January he was picked up in Yuma on another charge of some sort. His brother and his brother-in-law and his sister -- well, his brother-in-law and his

sister were in jail also at the same time, and in response, we maintain for a trade-out agreement, the brother-in-law and sister's charges were dismissed and they testified that George had told them that he had done a shooting in Tucson.

George maintains that that's not what happened, but at least that was the testimony that the jury heard.

The testimony of the other eyewitnesses to the incident was pertinent to the case. Both of the eyewitnesses that were identified at that time as being eyewitnesses, Your Honor, said that this was not the man, in essence. We weren't favored by the prosecutor, Your Honor, with the testimony of what turned out to be the third eyewitness, and that was a Mr. Hanrahan.

Unknown to me, unknown to George's counsel at the time, Mr. Hanrahan was evidently working both sides of the street. I was called to the jail, or my attention was directed to Mr. Hanrahan by Mr. Washington during the trial. I visited Mr. Hanrahan at the jail. He advised me, he gave me a version of what had happened at the hotel on that night, and then he immediately notified the police department or

the detectives who were working the case.

At that time he told -- and the evidence is clear on this -- he told the detectives who were working the case that he was a witness in the hotel shooting and that Mr. Washington was not the man who did the shooting.

There was quite a bit more conversation, needless to say, between Mr. Hanrahan and the police department, and the detectives working the case, and that culminated in Mr. Hanrahan's agreeing -- he says in response to the police department's request-- agreeing to "bust Bolding" and not testify in the trial. He agreed, then, at the request of the County Attorney's office and the police department to being wired up with a transmitter. He agreed then to contact Washington's defense counsel and to get him down to the jail, and that was me.

At the jail, in the presence of Mr. Fred Kay and myself, Mr. Hanrahan told again about the incident at the Arizona Hotel. This transmission, unknown to me and to Mr. Kay, this interview was being transmitted to a recorder in the Pima County Jail. The recording evidently didn't

do too well, because Mr. Hanrahan was later wired up again with a transmitter and sent to the Pima County Courthouse in the custody of the sheriff.

Mr. Hanrahan was seated outside the courtroom where the trial of Mr. Washington was in progress. At a recess, I exited the courtroom and saw Mr. Hanrahan sitting there. Thinking that he was probably going to be a witness for the defense all along, and knowing that the State was still in its case, I had some wonderment as to why he was there.

I asked him why he was there, and he said, well, he didn't know, he was just looking for a deal. I told him that I was not the person that could make a deal, but that Mr. Cooper the prosecutor was the one who could make a deal. I asked him further if he was going to testify, and he said, "Well, I don't know," and my words to him were -- and I used uncouth language at that time -- I said, "Well, you son of a bitch, if you testify, you better tell the truth."

Well, I didn't know at that time that my words were being transmitted not only to a recorder in the courtroom adja-

cent but also were being transmitted via the wireless transmitter to the office of the Pima County Attorney where Mr. Stevens, the chief criminal deputy, and five or six other deputy county attorney's were listening to the transmission, and some of the investigators. That was not discovered until nearly two years later, a year later, year and a half later.

In the interim, the tape recording somehow became lost by the Pima County Attorney's office. In the interim, Mr. Stevens and Mr. Dingeldine, the deputies, contacted Mr. Kashman, who was the Pima County Public Defender at that time, and advised Mr. Kashman that I, Ed Bolding, was involved in attempting to suborn perjury.

There was never any conversation with Mr. Kashman or with me that Mr. Hanrahan had in fact confirmed in his first conversation with the police department that Washington had not done the shooting. There was never any transmission to Mr. Kashman or to me that the recordings were made of the conversations that I had with Mr. Hanrahan. There was never any trans-

mission made to Mr. Kashman or to me that these recordings were completely exculpatory insofar as Bolding was concerned and Hanrahan. Only the accusation that I had been involved in attempting to suborn perjury.

I discovered this, Your Honor, as I state, about a year and a half later, after an appeal had been filed, after Mr. Washington had been convicted, after the appeal had been filed and there was a motion for a new trial.

That motion for new trial was granted on June 4th, 1973, based solely on the fact that Hanrahan had made the statement to the law enforcement officials that Washington did not do this, in essence, and that that statement had never been divulged to Washington or his counsel at that time as required by the Brady doctrine.

The County Attorney at that time then filed an appeal in behalf of the State appealing the ruling of Judge Truman granting the new trial. The matter sat with the Arizona Supreme Court from June 4th of 1973 until June 20th of 1974, at which time the new trial order was affirmed.

There was an additional appeal by the State in the way of a motion for rehearing. Finally in September of 74 the motion for rehearing was denied.

This information was not divulged, Your Honor, even in the face of a Brady motion being filed by defense counsel asking for any and all exculpatory or beneficial material. It was never divulged voluntarily. It had to come by investigative work by myself.

In November of 1974 we filed in behalf of Mr. Washington a motion to dismiss. That was based, Your Honor, on the previous facts of Mr. Hanrahan's talk to the Court and to me and his testimony that was given in regard to the new evidence. It was based on that and it was based on the fact that the County Attorney of Pima County had never divulged to defense counsel the exhibits which we listed and numbered A through X, or whatever the numbers are, those that were attached, and I have a spare copy in case those didn't get attached. Those items, Your Honor, have information covered in the appendix to my application here, those items were never willingly divulged by the County

Attorney, either.

Early in October, I believe it was, I copied the Brady motion that had been filed back in January of '71. I just copied it and changed the dates and filed that. The County Attorney filed his response to that Brady motion and in essence copied the response of the first Brady motion, saying again, to add insult to injury, saying again that there was no Brady material in his file.

Upon the in camera inspection by Judge Truman, the items that we have attached here, the several police reports of various sorts, were ordered to be divulged. Those items, Your Honor, included a written statement from a witness, Alonzo Rodriguez, a signed statement which talks about the fact that the man who did the shooting was a Mexican man, was a Spanish-speaking man. In other statements to the police officers, the statement was made that he was a light-complected man. In other statements, he was -- he made the statement, the witness made the statement that he was positive that the killer spoke with a Spanish accent and is positive the suspect is Spanish.

That other information in regard to statements from other witness that the killer had driven off in a 1959 Mercury automobile, that was never divulged. None of these statements were divulged at any time, and counsel was not aware of any of those statements.

The prosecutor -- and I believe the testimony that you will see from the motion to dismiss transcript -- I believe the testimony of Mr. Cooper, the prosecutor at that time, is really unbelievable. The prosecutor, Mr. Cooper, states that as of this time, right now, that those items are not covered under the Brady doctrine and are not discoverable by the defense. He maintains and his statements are "there were no Brady violations. I could see no detrimental result to Mr. Washington by not divulging this information. I don't believe these statements were favorable to George Washington," by the prosecutor's statements.

There is not another prosecutor in this state, Your Honor, who believes that. I submit that Mr. Butler, who has been assigned to argue this case, does it out of a sense of advocacy, as opposed to a sense

of believing that Mr. Cooper really believes that these items were not discoverable under the Brady doctrine.

There was either gross negligence or willful, intentional suppression, Your Honor, of all these items on the part of the prosecutor.

This prosecutor, Mr. Cooper, was guilty of misconduct. Mr. Stevens is guilty of misconduct. Mr. Dingeldine is guilty of misconduct. The County Attorney's office at that time prosecuting this case willfully and intentionally in an attempt to do something, get a conviction or to bust the lawyer for the defendant, for some reason they engaged in a conscious, willful course of conduct which denied to Mr. Washington the fair trial that he was entitled to.

The prosecutor makes the contention now that, well, it doesn't make any difference because the witness, Mr. Rodriguez, has recanted, and the witness Mr. Rodriguez has now become a suspect or was a suspect at that time, and that's why this information was not divulged. Lots of reasons were given, none of them valid, as to why

the information was not given. It's just a matter of fact that the County Attorney's hand got caught in the cookie jar and he's having to try to make some explanation as to why he willfully, intentionally and maliciously withheld the information that he did.

And I don't make those charges lightly, Your Honor. They are in the record. They are available --

THE COURT: I have a recollection that in your closing argument in the trial that you refer to the Rodriguez statements.

MR. BOLDING: I did, Your Honor, I referred to a light-complected -- at the time of trial, I got one statement, a portion of one statement, that said something about the fact that he was light-complected, Mexican or Negro. These statements were not ever divulged. The testimony is, as the Court will note from the record, that not only did I make a Brady motion to obtain all of the statements that were never divulged, but I also talked with the prosecutor, also talked with the chief detective, and both of them lied about Mr. Rodriguez to defense counsel, and they do not deny that. In fact, Sergeant Bunting,

in his testimony on the motion to dismiss, states, "There is a number of times when I talk to you when I really don't tell you the truth when I'm not on the witness stand."

Specific requests were made by me of the County Attorney at that time, Mr. Cooper, and of the chief detective for information about Mr. Rodriguez. They assured me, "Oh, we don't have anything. We don't have any way of knowing what he's going to say, except he is going to identify your man as being the killer," when that simply was not the case at the time in January of 1971 or in May of 1971 or at any time up until October of 1974, never.

So I did refer to it just as a matter of grasping at straws. I referred to a portion of one statement that I was able to finagle some way from the County Attorney during the trial. But never at any time were the remainder of these statements given to defense counsel.

The prosecutor has prepared a chart stating about these original statements, Rodriguez' original statements to the police, Rodriguez' involvement with the

crime, all of those, and saying, "Well, he knew about it. Bolding knew about it because it was mentioned at the preliminary hearing."

Sure, it was mentioned at the preliminary hearing, and then I made a Brady motion to try to obtain any statements, and the prosecutor assured me there were none. I made a Brady motion, and the chief detective assured me there were no such items. Those statements that are made in this particular table talk about the preliminary hearing, talk about the fact that Rodriguez' possible involvement in the crime or an interview with Rodriguez was talked about at the preliminary hearing, and, yes, his name was mentioned at the preliminary hearing, and that's clearly why I had any interest in making a Brady motion, why I had any interest in making a specific request of the County Attorney and the detective and then was lied to.

And then the prosecutor stood up in court and said, "There are no items in my file which would be of benefit to Mr. Bolding or to Mr. Washington," and that's in the transcript, Your Honor, of the

hearing on my motion for production of items under the Brady doctrine.

It's clear as a bell Mr. Cooper is standing there lying to the Court and saying, "We don't have anything in our file that would help this defendant." I did all that I could. I made my Brady motion. I pursued it as hard as I could pursue it and met with a blank wall, with a dead-end street, and was just able to try to wing it in court and try to mention the fact that somebody talked about light-complected or Mexican. And if the Court would read my argument, you will see that I was winging it at that time, based on the fact that there was no information like this in the County Attorney's file.

Okay. These items, we maintain, Your Honor, should have been divulged. Okay. We got our new trial. That's been ordered. We finally, after the appeals by the State, it was finally affirmed and we have our new trial, and that's what we start and that's our third complaint here, in regard to the mistrial that was declared in January of this year. We got our new trial, Your Honor, but that's

not really what we are after.

We are after a dismissal in this case, because there was a gross calculated misconduct on the part of the County Attorney.

Because here, four years later when we finally got our new trial, times have changed, witnesses' memories have dimmed, there are many problems that have arisen that would not have been present had this information been divulged to me or to Mr. Washington in January of 1971 before the first trial in this particular case.

Now, what do we have? We have Mr. Hanrahan who has now, it's my understanding, been convicted of a felony in California and is in the California prison, as far as I know. I just got that information secondhand. Maybe he's out by now. But I believe that he has been convicted. Obviously that hurts his credibility in front of a jury for me to have to present him at this time as a felon in prison in California at a trial. That's a hard thing for me to have to do.

So that circumstance certainly has changed, Your Honor, which would not have been the case in January, February, March,

April, May of 1971, because Mr. Hanrahan at that time was incarcerated in the Pima County Jail and had not been convicted of the crime, either of the crimes with which he was charged. He was being held awaiting trial.

He was subsequently convicted of a charge here, was given probation as a trade, as the deal by the probation office here in Pima County.

The County Attorney, Mr. Cooper, and two detectives went to the probation office here and in confirmation of what I am saying was the deal told the probation officer that this man has been very helpful in the George Washington case and we want you to give him probation. Well, they can't deny that, either, because that happened, and the helpfulness was the fact that he didn't testify in the trial and the fact that he wired himself up to help us counsel for the defendant, unsuccessfully.

Now, then, the circumstances have now changed in regard to Mr. Rodriguez. Mr. Rodriguez made five or six different statements at the time, none of which were divulged, that the man did not do the

shooting. Now, that version has changed. That version has changed because of a trip made by Mr. Bunting when he saw that the trial was going to take place sometime shortly after October of 1974. Sergeant Bunting made a trip to Kansas to talk with Mr. Rodriguez. Evidently he had no trouble in finding him at that particular point when it became apparent the trial was going to take place.

Sergeant Bunting's testimony is recorded in some of these transcripts, Your Honor, in regard to the motion to dismiss, and I think that's very enlightening testimony in and of itself. Sergeant Bunting went to Kansas and talked with Mr. Rodriguez, and by his own admission Mr. Rodriguez, for the first six or seven minutes of the conversation, maintained the same version of the situation as he had back in 1971, or 1970 when the police department was talking to him at that time: Spanish-speaking person, light-complected, that kind of conversation.

Mr. Washington being black as your robe, Your Honor, simply didn't fit into that description at all.

The conversation continued with Sergeant Bunting at that point pulling out a picture of Mr. Washington -- and we acknowledge it was a picture of Mr. Washington, complete with mustache -- and Sergeant Bunting told Mr. Rodriguez, "Look, we have already got this man. He has already been convicted of the crime," and the testimony is a little hazy at this point, but something to the effect that he has already been convicted and he is coming back to trial, and that type of testimony, and that we have enough on you to where we can nail you with this crime also.

At that point, Mr. Rodriguez, pointing to the picture, says, "Oh, yeah, okay, that's the man, except the man that did the shooting, that man didn't have a mustache at the time," and Rodriguez then went on to tell Sergeant Bunting how he had spent the day with the man who later committed the crime and how the man didn't have a mustache, and Rodriguez maintains to this day that the man who committed the shooting did not have a mustache, after spending some eight hours with him on the day of the shooting.

Mr. Washington -- and I think it will be conceded by the prosecutor -- had a mustache at the time he was picked up in December of 1970, that he has had a mustache ever since. All of his pictures show a mustache.

And so I think that that's interesting by itself that Sergeant Bunting would be able to, number one, put his finger on Mr. Rodriguez just after a trial setting, within two weeks after a trial setting was made in this particular case and, number two, that Mr. Rodriguez would maintain the same story to him until he was told that a person had been convicted of the crime already and shown a picture and states, "Oh, yeah, whoever that guy is --" didn't even know his name, and had no idea of the name -- "whoever, that's the guy that did the shooting, but he didn't have a mustache at the time." Just very ironic and very interesting testimony, and that's covered in the motion to dismiss transcript.

So there is no way to put us back to January of 1971, to May of 1971 when the testimony from Rodriguez could very well have cleared Mr. Washington. And in fact the Arizona Supreme Court, Your Honor, even recognizes that in its ruling on the

motion for new trial.

Case No. 2408-2, Memorandum Decision, State of Arizona versus George Washington, Jr., states, "There is no evidence more valuable to a defendant than the testimony of an eyewitness that he did not commit the crime in question. The prosecution has an affirmative obligation to assure that a defendant receives a fair trial. The suppression of evidence was clearly prejudicial to the defendant and a new trial was warranted."

Underlined by the Court, another rule in effect, in regard to Rule 310, Arizona Rules of Criminal Procedure, "New and material evidence --" and here underlined by the Court, emphasis added -- "which if introduced at the trial would probably have changed the verdict or finding of the court --" the Arizona Supreme Court is recognizing that just Hanrahan's testimony by itself would probably have changed the verdict or finding of the court had it been presented, Your Honor, in May of 1971. We can't go back to that date. The circumstances have changed.

Hanrahan's situation has changed, and we can't say now, as a matter of fact, that that testimony would probably change the verdict.

Had Mr. Rodriguez been made available to us or his name or his statements or something, that would have given counsel a reason to want to go after him and try to find him; and had he been found at that time, had his testimony been made available in May of 1971, surely that testimony plus the testimony of Hanrahan would have changed the verdict.

Now we can't go back to that now, and that's what I'm complaining about. We have our new trial, but that doesn't do Mr. Washington any good and that doesn't take away the gross negligence or the calculated, intentional, willful misconduct of the County Attorney at that time. It doesn't take away the fact that he was denied his fair trial. It doesn't take away the fact that we can't go back there and have a trial under the same circumstances before the same jury that Mr. Washington was entitled to have determine

his guilt, and it just can't be now, and it just doesn't help us now to say, "Okay, come on back now and let's do your new trial one more time."

The prosecutor has cases which say, "Well, new trial is all that's ever been granted in this type of an area. New trial is all that's needed to be done to cure this mistake, even if there was a mistake, and even if there were excesses," to use the County Attorney's statement -- which is certainly an understatement -- and we feel that the law should be, whether it is or not, that this type of action cannot be condoned.

We have cited to the Court the line of cases -- Arizona case State v. Ballinger, and the line of cases, a Pennsylvania case, an Alaska case, a Third Circuit case, Fourth Circuit case -- which talk about the deliberate and intentional misconduct on the part of the prosecutor. Now, true, in the Ballinger case, there was deliberate or intentional misconduct, as it was determined to be, during the trial. It made the defense move for a mistrial. It was held that he couldn't be reprosecuted.

There is no difference in our case.

Had this information come to defense counsel's attention during the trial, obviously there would have been a mistrial granted, moved for and granted. It's plain, it's obvious that that's what would have happened.

Now we are saying, since the prosecutor did his misconduct, did his dirty deeds and hid all of this from the defendant, now, then, because we have already been through that trial, wasn't a mistrial, now, then, that misconduct, deliberate and intentional misconduct, is going to be grounds for nothing more than just a new trial.

We submit that that's not the fairness doctrine and that's not the type of action that should be allowed in our courts. We say that the jeopardy clause does prevent a retrial and it's just out of a sense of fairness to the defendant and out of a sense of the fact that this is the type of thing that the courts have traditionally frowned upon, looked down upon and criticized prosecutors for.

But this is the type of case that's just never simply been totally decided in this circuit, but Mr. Butler tells me there is a Seventh Circuit case of some sort that I will let him argue about, Seventh or Eighth Circuit.

Without knowing what the facts in that case are, the facts in this case are that Mr. Washington can never be put back in the same shape that he was in May of 1971 at this particular trial that he had, at this unfair particular trial that was afforded him, at this trial that was afforded him without full benefit of the information that the prosecutor was obligated under his duty and under his sense of justice to divulge to us.

Now I cringe for other people who might have been prosecuted by this particular same prosecutor if he doesn't know the difference or if he doesn't know the Brady doctrine. How many people have wrongfully been prosecuted already? Here's one already. I don't know. Here's one for sure. I don't know how many more there are, but I would submit that there are several.

We have also asked Your Honor, in addition to dismissal based on the

jeopardy provision, we have asked dismissal on the speedy trial provision, for lack of a speedy trial provision, for lack of a speedy trial, and Mr. Butler says, or the prosecutor, whoever prepared this answer, said, "Well, that doesn't apply. It just doesn't apply, because look who caused all this delay. Well, George Washington caused all this delay by appealing that conviction."

Well, now, how was the conviction obtained? The conviction was obtained only by lack of use of fair evidence, according to the Supreme Court of Arizona, which prejudiced him in his defense of his case, eyewitness information, no more valuable information.

So there was a conviction because the prosecutor did not divulge this information.

Now he is saying, well, now, we can't worry about a speedy trial, because he was appealing --

THE COURT: Mr. Bolding, doesn't that argument assume an outcome of the trial if the evidence had been made available to you?

MR. BOLDING: Yes, Your Honor, it does.

THE COURT: I think that's a little too much. I mean nobody could prognosticate that if Hanrahan's name had been given, that the outcome of the trial would have been different, because apparently Hanrahan is a guy that worked both sides of the street, as you put it, sucked in the prosecutor and then he sucked you in, and you both took him in good faith, I would have to assume.

MR. BOLDING: I would differ only with that last statement, Your Honor.

THE COURT: Well, I don't think you differ with my assumption that you took him in good faith.

MR. BOLDING: No, I wouldn't differ from that.

THE COURT: I think this is the most unfortunate thing that happened in the case, and I think it's been, in a sense, something that's colored it or affected or influenced it all the way through from the time that Hanrahan got into the act and worked both sides of the street.

MR. BOLDING: Your Honor, I agree, it has influenced. I do differ in the good

faith aspect of the County Attorney, because they knew at the time that Hanrahan said, "Washington didn't do it," and then they made him the deal, and then they wired him up and then they followed through with the deal by recommending probation.

So I agree it's colored the case all the way through, but I don't think that that's any more important, Your Honor. In my opinion, that's certainly not any more important than all of the statements from Rodriguez that were tucked in the back pocket of the prosecutor and not divulged. Certainly that's information that is critical to the case and was at that time. And it couldn't have been any more clear that that type of evidence is the type of evidence that if anything would clear Mr. Washington, that type of evidence would.

And again I have to state that the Arizona Supreme Court outlined on their own that the evidence if introduced at trial would probably have changed the verdict or finding of the Court. I think the Arizona Supreme Court has accurately

assessed the situation, in that it probably would have -- and we can't say that it would have for positive. It should have. We can't say it would have, but probably would have. Probably this type of testimony would have changed the verdict, and that's what the Arizona Supreme Court was interested in and was emphasizing.

But, Your Honor, the fact of the speedy trial, the four factors of Barker v. Wingo are certainly there, and they are all attributable to the State. They are all attributable to the State because of the lack of divulging of the fair information that they had in their possession which they didn't give. The length of the delay, the reason for the delay, all of those are directly attributable to the fact there was a conviction.

Then the prejudice, now, the prosecutor in his answer skips over the fact of this prejudice situation. How much prejudice was done to the defense in this case? I can't find that they are saying that there was not any prejudice, because it's a matter of fact that there was prejudice here. They state that Washington was responsible for 63 percent of the

total time that elapsed after his conviction. Well, he was responsible only because the evidence was not produced that could have cleared him.

THE COURT: Well, couldn't you make that same argument about any case that is reversed? In other words, that there has been a delay in trial, an inordinate delay in trial, violation of constitutional rights, because if the prosecutor hadn't stumbled and erred, the case wouldn't have been delayed so long?

MR. BOLDING: Yes, Your Honor, that could be made, but I could not personally get up here and with the same conviction make that same argument to this Court where there was an error, where there was negligence on the part of the prosecutor, where there was an error on the part of the Court in trying the case, a real misinterpretation of what happened, a real misinterpretation of the law. I couldn't with the same conviction argue that.

But where there is by the evidence, by all of the testimony, a deliberate and conscious misconduct on the part of the State, Your Honor, who is charged with fairness in this area, I can make that

argument with conviction, because here it's just as if Mr. Cooper had started off saying, "Well, we are going to nail Bolding and in the process we are going to get Washington, too," and then he tried to do it and he was successful in one and not successful in the other, and it was misconduct and it was gross, and from all of the testimony that -- I guess I should have put on some expert testimony at one of these motions to dismiss, picked a name out of the hat of any attorney that has ever practiced criminal law and asked his opinion as to this hiding and this suppression of the evidence. There is not a one that would say that it was fair. There is not a one that would say that the prosecutor shouldn't have known better. There is not a one of them that would say it was just something he overlooked, because he calculatedly went in and omitted to tell about Hanrahan's first statement, calculatedly went in and wired him up with the transmitter and calculatedly hid the evidence about Rodriguez. It's just there.

He is either totally devoid of knowledge or it's a calculated suppression of the evidence, and I don't know which way this prosecutor, Mr. Butler, will argue insofar

as Mr. Cooper is concerned at this time, but it has to be one way or the other.

THE COURT: Well, let me ask you this: At the same time that Mr. Cooper is, as you say, secret, you were in fact with Hanrahan?

MR. BOLDING: No -- oh, I'm sorry, yes.

THE COURT: Weren't you down there talking to him? Isn't this the way it started?

MR. BOLDING: Yes, that's correct.

THE COURT: He was telling you he knew something about the thing, so you did know Hanrahan was there.

MR. BOLDING: Yes, I did.

THE COURT: And what did he tell you? Did he tell you he was in there and this thing never happened?

MR. BOLDING: Well, my testimony is in here also, Your Honor, and I hate to paraphrase my testimony, but essentially what he had told me on the first visit down there was that he didn't want to get involved and he was looking for a lawyer in his case and he was looking for a deal in his case, and I told him I could make no deal, I was with the Public Defender's office at that time, would try to see that he had an attorney representing him on a case that

he had. We were representing him, the Pima County Public Defender's office was, was representing him on one case. He didn't have an attorney on the other case.

I told him I would try to see that he had an attorney. I asked him about the incident -- and I didn't refresh my memory on that. I don't think I really need to -- but he talked about the fact he saw a man run by his door, heard a shooting and saw a man run by his door. It looked like the man had on a long coat, looked like he was bigger than Washington, that kind of testimony.

The second time I went down there with Mr. Kay, he told the same version except he placed him back a little closer to his door. Then my third conversation with him was at the courthouse during the State's case when he was brought to the courthouse. Well, you know I have had enough trials and had enough experience to know that when the prosecutor brings somebody down there to testify and sets him outside, probably he is not going to help me a whole lot, and so thinking that, I made my inquiry of him what he was looking for and what he was doing. Turns

out that he was looking for me to try to make him a deal, for me to say, "Okay, if you won't testify, I'll give you a hundred bucks, or if you don't testify I'll do something." That's what he was wanting me to say, because that's what he was instructed by the law enforcement officials to try to get me to do.

THE COURT: Well, if you won't testify? I thought this statement as far as he made to you was favorable, that this man was bigger than Washington.

MR. BOLDING: It was generally favorable, but what the reversal came from and the new trial that Judge Truman granted and the Arizona Supreme Court affirmed came on the same basis that he had told the law enforcement officials that this man did not do it. He had never told me that. He was generally favorable and he was then, after the law enforcement officials got in the act, then he was playing both sides and he wasn't being candid with me and he was trying to set me up, so he later had a change of heart, a year and a half later, and broke down and confessed to me and an investigator from my office that I was the only one that had

been halfway decent to him and he wanted to tell me the truth about the situation, and then all this came out, and that's where it all came from.

But at the time, I did not have the benefit of that testimony, of the fact that he said, "I saw the shooting." Now, Hanrahan's testimony is, "I was standing there at the scene of the crime, I saw the man pull the trigger and it was not Washington." To me, he was saying, "Well, I just saw him through the hallway there," or something similar to that type of testimony.

THE COURT: Well, he is evidently a witness that if either side calls him the other side has plenty of ammunition for cross-examination.

MR. BOLDING: Your Honor, I would say that he is probably subject to impeachment from either side, at this time. But I'm trying to put our minds back to the time of the original trial, in May of 1971. What would it have been at that time if the prosecutor had said, "Hey, Bolding, this guy says he saw the shooter, saw the guy that did the killing and it was not Washington. I don't believe him but I'm obligated under the Brady doctrine, under the

United States Supreme Court decisions, I'm obligated to tell you that. And besides that, I have got statements in my file that tell you in six different statements that the guy that did the shooting was a Mexican, was a Spanish-speaking person, six different statements along that line. I have got evidence in here that the killer left in a 1959 Mercury. I have got evidence in here that shows that a man fitting the description of the killer was picked up in Flagstaff, Arizona, and released because we just didn't think it was him."

No follow-up was done on that at all. Nothing was done. That was not divulged to me, all of these things. If that would have happened in April of 1971 before the trial in May of 1971, certainly this Court would have to agree that there would have been a different trial. I mean it may have come to the result, but it may not have, and the Arizona Supreme Court says probably would not have. In my opinion, that's what they are saying. Certainly the trial would have been different.

Now, then, five years later how can it be? Because we have totally different

circumstances now than we had then, and all of those circumstances -- again I'm a broken record here, Your Honor, but I attribute them all to the intentional misconduct of the County Attorney, and again I feel that the speedy trial issue is one that is important and can fit very well in this particular case.

Our third contention, Your Honor, is in regard to the mistrial which was granted by Judge Buchanan in January of this year. The prosecutor, who was Mr. Butler in this particular case, Your Honor, talked about the four-year period of time, repeatedly talked about the four-year period of time between the time James Hemphill died and the date of the trial. He made reference to the fact that many of the witnesses who were to be heard by the jury had already testified "in at least two other proceedings." He also stated and inferred that a magistrate had conducted a preliminary hearing in this particular case and had made findings, inferred that findings were made against the defendant. That's at page 50.

We objected to all of those statements, Your Honor, and asked that a mistrial

be granted at that particular point. Those requests were denied.

I therefore treated Mr. Butler's feelings and words and actions as the law of the case, as I am entitled to do, and I explained what the two prior proceedings were. During my opening statement I made reference to the former trial in one form or another on no less than about eight occasions. I didn't count how many times Mr. Butler in his opening argument mentioned the former trial or that type of testimony that would be forthcoming. I did make the statement that for the reasons already presented, because of prosecutorial misconduct, that the Arizona Supreme Court had granted a new trial. Never any objection, ever, to any of the statements that I made. The only objections that were made came from my side of the bench, objections to the prosecutor's pursuing this particular line.

I went on. I continued for another minute after I talked about the granting of the new trial. After coming back from noon recess -- there was a recess for lunch, and after that, then, Mr. Butler moved for a mistrial based upon the mention by me of

the Arizona Supreme Court decision. That mistrial was denied, motion for mistrial was denied. I was ordered not to introduce the opinion without presenting authority for its admission, and I agreed to follow that order and agreed to furnish the Court with some type of authority before I could present the ruling by the Supreme Court, which I intended to offer at that time.

The trial continued. Two witnesses gave testimony, and then the motion for mistrial was renewed the next day, based on what I would call old Rule 314 of the Arizona Rules of Criminal Procedure. This was the only reliance that the Court made to any authority that was ever cited to the Court. Judge Buchanan said that the only thing that he was concerned about in the motion for new trial was the fact that Rule 314 was there.

Well, Rule 314 talks about the fact that there should be no mention of the finding or verdict of the previous trial. Okay. The finding or verdict of the previous trial was one of guilty. Twelve people said that George Washington was guilty. That's the reason it's a protective -- it's a defense protective rule, Your Honor,

and that's the reason we have the rule. The United States Supreme Court has said that's the reason we have the rule, in the case of Hunt vs. Utah. The United States Supreme Court in interpreting a rule just exactly like Rule 314 of the Arizona rules states that this is the reason that a prosecutor can't go in there and tell a new jury, "Look, twelve other people convicted this guy and now you have got to do the same thing." That's the reason for the rule, and that's what the United States Supreme Court said.

Notwithstanding that, and unknown to either Mr. Butler, the prosecutor, or the Judge or the defense counsel, me at that time, unknown to us, Rule 314 was held to be unconstitutional by the Arizona Supreme Court. The new Rules of Criminal Procedure have omitted the old Rule 314 because it is unconstitutional in at least its first and last sentences, and certainly we did not violate the second sentence when we talked to the jury.

Okay, number one, the rule is protective of the defendant who can probably waive it if he wants to go in and say to the jury, "Look, this guy was previously convicted," which I happened to have chosen

to do in light of Mr. Butler's continued statements in regard to the previous proceedings, prior proceedings, recorded testimony in that type of situation.

Not only can I waive it, but also it's been held to be unconstitutional. The Court cannot rely on a previously held unconstitutional rule as authority for a judicial decision. The validity of the granting of a motion is in question simply because of that. The prosecutor is going to say, well, manifest necessity, public justice, all of those things required a mistrial.

There was never ever during my argument, during my opening statement, never any objection. This was certainly treated as the law of the case. There is simply no valid reason for the mistrial. Because of that, the jeopardy, the jeopardy provisions would apply, and Mr. Butler will concede to you and has conceded to you that if Judge Buchanan was in error in granting the mistrial, then obviously the case must be dismissed.

We feel that this contention, Your Honor, this third contention that we make in regard to the mistrial is very urgent and very important. We feel that there is no necessity to have Mr. Washington taken back

through another trial, subject to another trial, when in fact the Court did make a mistake in relying on old Rule 314 and did make a mistake in granting a mistrial. We say that the matter is simply one that should now be terminated because of that, even if this Court does not go along with our contention that simply the matter of fairness must be looked at.

One question that I have asked the prosecutors, Your Honor, time and time again is, "How many shots do you get at a fellow? How many trials do you give him? You go through one trial and then you find out that you get caught in suppressing some evidence and you say, "Oh, well, you caught us this time. We'll let you have another trial," " so we go through another trial and a prosecutor gets caught again doing something or a prosecutor suppressed additional testimony, and then we say, "Well, that's all right. That's twice. You get at least twice. You get at least two new trials." Then we do it again.

I don't know how many times courts will allow prosecutors to engage in misconduct, how many new trials will be granted. In our opinion, Your Honor, the

time has come to put a stop to this type of misconduct and to say to prosecutors in the future, "Don't do this type of intentional misconduct. Be a lawyer and make mistakes like all lawyers do, but don't do them intentionally. Don't withhold the evidence on purpose. Do it within your duty as you are obligated to do, and that's all right as long as you are doing your duty and as long as you are making just the normal usual customary amount of mistakes that prosecutors and other lawyers make. That's okay. We are going to forgive that type of action and we are going to grant a new trial, but where it's intentional, where it's on purpose, we say that once is enough."

And under the Ballinger case and those cases that follow in that line, we say that this type of conduct certainly is what the courts have had in mind, and certainly this misconduct should be borne in mind when this Court is making this particular decision.

We say all of these areas are important. We feel a little bit more favorable in the first and third arguments than in the second argument, although I still maintain the second argument in regard to speedy trial can be applied here. We are just

asking, Your Honor, that fairness be done to this man who has sat for five years, who has been punished for five years for no reason except that we had a prosecutor who had no knowledge of his duty or miscalculated his duty on purpose.

Do you have any questions, Your Honor?

THE COURT: No, I think you have covered it very thoroughly.

MR. BOLDING: Thank you sir. And too long.

(Recess taken)

MR. BUTLER: If it please the Court--

THE COURT: Well, perhaps, Mr. Butler, I could expedite this. I have had the benefit of this record for some time. I have examined it and studied it and renewed the examination as we got to today. The problem I have is the granting of the mistrial in the trial that was started, the retrial.

I think there is much to the argument Mr. Bolding has made on the other points, but I don't believe I would grant the -- I don't agree that he is entitled to the writ on what happened in the first trial or immediately after that trial, but I do have a very serious problem with the granting

of the mistrial, and I think I should tell you that and let you direct yourself to that.

MR. BUTLER: Fine, your Honor, I will confine my remarks to that issue.

It's the position of the respondent, Your Honor, that Judge Buchanan, when he granted the mistrial, properly exercised his discretion because he found that an impartial verdict couldn't be reached.

THE COURT: This is my problem. He didn't find that at all. Actually, it was argued for an afternoon and he denied it.

MR. BUTLER: That's correct.

THE COURT: Then you came in the next morning and said you had some additional study on the matter and some help and argued it again, and he ended up making the same statement. His statement is: "Based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion and its effect for the reasons for the new trial, the motion for the mistrial will be granted."

MR. BUTLER: Your Honor, I think in Judge Buchanan making that statement, it's implicit in his remarks that he believed at that time that those remarks of Mr. Bolding concerning the Supreme Court's de-

cision, those remarks would cause the jury or might cause the jury to reach an improper result.

THE COURT: Well, I don't see how you can say that. He doesn't give any indication. Let me tell you my own conception of the thing. In the first place, I can't agree, if I were going to make the finding, that it would be impossible with the two or three sentences that Mr. Bolding -- I agree, improperly -- made during his argument without objection, that it would be impossible to get the jury to disregard that. I have more confidence than that in juries. And it wasn't even canvassed here, "What could we do by way of undoing Mr. Bolding's unfortunate error? Could the Court very strongly point out, 'That these men have just been giving you a road map and none of what they say is evidence and you must absolutely disregard and lay out of your mind this comment about another case. It has nothing to do with this. Is there any juror who feels that he or she couldn't just eliminate that entirely from their minds and try this case fairly and impartially?'" I think that could be done, but that would be me and not Judge

Buchanan.

But this isn't even canvassed in the argument, and Judge Buchanan evidently the night before decided that there wasn't any grounds for mistrial. He denied the motion.

I think, really, under the cases, that the Court is under the obligation, if he grants it, to find that manifest necessity exists for the granting of it.

Actually the one thing which bothers me and which I think had an effect on Judge Buchanan that led him to change his ruling was the fact that you stated to him very frankly, "Judge, I realize if I'm wrong in getting this mistrial, this man walks, and I'm so convinced of my standing I'm willing to take that chance." He at that point, as I recall, said something to you about, "Do you realize you didn't make an objection when this statement was made?" and you agreed that you did realize that. And I think Judge Buchanan thought, "Well, I made a ruling yesterday and now the County Attorney tells me I'm wrong and he is willing to stake everything on my changing my mind," because the Judge doesn't anywhere say, that I can find, why he believes that there is manifest

necessity or that it's not going to be possible for the jury to be impartial or render an impartial verdict. He doesn't make any finding. This is my problem with it.

MR. BUTLER: Well, Your Honor, I think that when the Court indicates that if the Court were the trial judge, you would have handled it in a different manner, that may be, but I don't think that --

THE COURT: I don't think that has anything to do with it. I say that and this is just something in passing. I'm basing, really, my ruling on the fact that Judge Buchanan didn't state any finding on the basis of which he granted except Mr. Bolding had made these remarks.

MR. BUTLER: Well, Your Honor, it's my opinion that that statement made by Judge Buchanan in and of itself contains in it his reasons for the granting of the mistrial and his understanding that under the circumstances of the case, as it had existed or did exist at that time, that the jury would be unable to render a proper verdict. I do not believe that a trial Court has to say, "I find manifest necessity. I find that under the circumstances that

presently exist an improper verdict will be arrived at," before any appellate court could uphold the Judge's granting of a mistrial.

THE COURT: I think we disagree there. I think there has to be a basis for granting a mistrial. I think anytime that the Judge grants a mistrial over the objection of the defendant, double jeopardy just raises its head prominently, whenever you do that, and I think it's requisite that there be a finding of why you granted, that there is manifest necessity for it, in the language of the cases, or at least that the Judge say, "I find that it would be impossible if we went on with this trial no matter what we did about this impropriety of Mr. Bolding's, it would be impossible for the jury to arrive at a fair and impartial verdict."

MR. BUTLER: Your Honor, I think Judge Buchanan did make a finding. He did not use the words "I find manifest necessity." He did not use the words --

THE COURT: What you are actually saying is, even if his order is just bare bones, that you have got to imply these things. This is where I disagree.

MR. BUTLER: Your Honor, I think in the records it's obvious Mr. Bolding and I talked about manifest necessity. Mr. Bolding and I talked to the Judge about alternatives. Judge Buchanan considered alternatives. Mr. Bolding talked about an admonition. I talked about an admonition to the jury. I told the Court I did not believe any admonition could properly cure the statements that Mr. Bolding made. I think that it would be foolish for us to assume that simply because Judge Buchanan denied my motion for a mistrial the first day, that he did not think about that issue that night, because the next morning when I moved for a mistrial he was receptive to the arguments that I made.

It's difficult for me to understand how the Court believes if you don't use certain magic phrases, even though those magic phrases have been discussed in the arguments prior to the Court's arriving at its decision, that therefore the decision of the Court is an improper one. I'm not sure if the Court is telling me, Your Honor, that had Judge Buchanan said what he said and then said, "Because manifest necessity requires the material," or

"Because I find that an improper verdict would be arrived at, I have decided that these remarks --"

THE COURT: I think precisely that. In other words, I would know then he felt that and I would have to say that he found that, that he found that manifest necessity required it. Or if he said, "There is absolutely no way that I think we can undo this to the extent that an impartial verdict would be a possibility," This would settle it for me. But I can't find it.

MR. BUTLER: I certainly agree that it would make it clearer, but I don't think that by him not making those remarks that a proper finding could be made that Judge Buchanan did not consider alternatives, did not consider whether or not manifest necessity required that a mistrial be granted. Had Mr. Bolding and myself in our arguments not discussed those issues to the Judge, if there were no evidence in the record that suggested that Judge Buchanan considered whether or not the remarks would improperly influence the jury, if there were nothing in the record to suggest that Judge Buchanan did or did not consider alternatives, then I think that what the

Court is telling me would be a proper finding. Because if there is nowhere in the record to show that he thought about manifest necessity or nowhere in the record that shows he thought about alternatives and if he simply made that statement and said, "Mistrial," then I think it would be an improper ruling on his part.

But it is implicit in what Judge Buchanan said, based on the argument that he had heard from both sides. And that was a long argument and there was one recess when Mr. Bolding went to look for some research. We made some of the same statements we had made the day before. He knew, Judge Buchanan knew that I was saying that those remarks of Mr. Bolding had so influenced the jury that the jury could not render an impartial verdict. That was the reason why I asked for the mistrial.

Judge Buchanan knew that there were alternatives to his granting the mistrial, because we discussed them with him. After discussing those things with Judge Buchanan, he stated that because of Mr. Bolding's remarks he was going to have to grant a mistrial, and it is implicit in what he

said that he believed that those remarks of Mr. Bolding had so improperly influenced the jury that he had no other decision to make.

THE COURT: This is where you are reading something into it that I simply can't follow you. As I say, I really note a change in his attitude toward your motion from the point on where you say to him, "Look I know if I'm wrong this man walks, and I'm willing to have you rule with me on that basis," is the import of what you are saying, and he at one point, when you make that statement, says to you, "You realize that you didn't make any objection to these remarks when they were made." In other words, he is wanting to know, "Are you saying you will take this risk even though you made no objection?" and you tell him, yes, and go from there.

MR. BUTLER: He indicated I did not make an objection, but he never indicated that the objection made was untimely, and I would not concede for a moment that the objection that I made was untimely, because it was made at a time that allowed the Judge to remedy the error that Mr. Bolding had created. That's whether or not

an objection is timely or untimely, and I gave Judge Buchanan that option. He had, when I moved --

THE COURT: I'm not arguing that with you, but I am saying this shows the fact that he became more inclined to go along with you after you told him, "Look, I know the consequences if I am getting you to do something you shouldn't do."

MR. BUTLER: I think Judge Buchanan realized those consequences, Your Honor, before I said that. I mean he knows if a mistrial is improperly granted that a defendant walks. Surely I think it would be wrong to assume that my statement to Judge Buchanan was the first time Judge Buchanan had considered that.

Now I can't for a moment tell the Court what was in Judge Buchanan's mind. All we have is what's --

THE COURT: I think that's the difficulty both of us have when he didn't give any reason except just to grant the order on the basis of the statement.

MR. BUTLER: Well, when I say I can't tell what's in his mind, I'm referring to the effect that my statement made on him about I know he will walk if the mistrial

is improperly granted. I think there is every reason in that record that causes me to say, when Judge Buchanan granted that mistrial, the reason he granted that mistrial is because he had found in his mind that manifest necessity dictated the mistrial, because that's what we talked about. That's what we argued, and it was the basis--our argument and the position we took caused Judge Buchanan to arrive at a decision. You cannot take Judge Buchanan's decision in a vacuum.

THE COURT: No, but you can't say, either, since he didn't say it, that he found there was manifest necessity for it. People usually, if they make a finding like that, express it. And I think we are all agreed that under the law, when there is a motion for mistrial on the part of the State for misconduct or some impropriety on the part of the defense counsel, the Court shouldn't grant it by reason of the double jeopardy situation that you get into unless there is manifest necessity for it. I think that's the language of all the cases. You used it in argument --

MR. BUTLER: Certainly --

THE COURT: --but then how can I or

anybody else say that Judge Buchanan found that, when it would take fifteen words or twenty words to say it and he didn't say it? He didn't say anything except, "Because Mr. Bolding said this, I'm granting the motion for mistrial." This is the sum and substance of the Court's action, and I think that you can't make a finding, in light of this, that Judge Buchanan found that it was manifestly necessary to grant the motion for mistrial. This is the problem I have with it.

MR. BUTLER: Your Honor, it's not going to do me any good, or the Court, to repeat what I have said. It's obvious your feelings and mine are different. I think that no case says that the Judge has to use the magic words "manifest necessity." I think what they have to find is that the record supports that manifest necessity was dictated, but I have not read a case that says a Judge, a trial judge, has to use those magic words.

THE COURT: You see what you get into then is that you don't get the ruling by the Judge who granted the mistrial; you get it from somebody who looks at the record and says, "Well, I think it would

have supported this, and I make the finding."

In other words, what I would have to do here, if I were going to sustain Judge Buchanan, is to say that I find that there is manifest necessity. And my reason for my statement earlier about I couldn't find it if it were me -- and yet I have to say, well, Judge Buchanan found it, although he didn't say so. I can't do it.

MR. BUTLER: As I say, I don't know what else I can tell the Court than what I have already said. I think it's obvious in the record that he found that, because that's what we were talking about in our argument to him.

THE COURT: Well, this is where we really part company, because I think findings are findings and not something that can be implied from the Order. I think to sustain that order you have to be able to show that the Court found it, not that he had to have found it, in order to grant the motion, because that's just mental telepathy.

MR. BUTLER: Your Honor, I really don't have anything else to argue on that point, and I don't want to repeat myself.

THE COURT: Well, I have been over this, as I say, the matter, and read all of the proceedings on the 8th of January and the 9th, and this is the conclusion I have come to with respect to the order granting the mistrial.

My finding is that the order was ~~was~~. I cannot find that the order was based on any finding of manifest necessity for granting the mistrial, and consequently a further trial of the defendant would be a violation of the double jeopardy provisions.

In the matter of granting the writ, I would make a provision incorporate in it that I would leave it to counsel to draw the order that the writ would be granted within sixty days unless the State has in that period given notice of appeal of my decision to the Ninth Circuit, and I would require that, if the appeal is taken, that the writ not be granted until the disposition of the appeal, not actually issued until the disposition of the appeal. There shouldn't be any difficulty in getting the narrow ruling that I have made to the Court of Appeals.

MR. BUTLER: Judge, can I ask a question? And it's a question I am going to ask out of ignorance in the federal system. Am I required to file a motion for rehearing before this Court?

THE COURT: No.

MR. BOLDING: And, Your Honor, in your ruling, you are granting the writ but you are making a finding against us on my first two contentions?

THE COURT: Yes. That was the import of my statement. I would not grant the writ on the basis of your contentions on the first two points.

MR. BOLDING: All right.

THE COURT: We'll stand at recess.

C E R T I F I C A T E

STATE OF ARIZONA)
County of Pima) SS:

I, David W. Lundy, do hereby certify that as court reporter in the United States District Court for the District of Arizona I was present at the foregoing-entitled proceedings; that while there I took down in shorthand all the proceedings had; that such shorthand has been reduced to writing under my direction, and that the foregoing typewritten matter contains a complete and accurate transcription of my shorthand notes as taken by me.

/s/ David W. Lundy
Court Reporter

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GEORGE WASHINGTON, JR.,	}	NO. CIV 75-85
Petitioner,		
vs.	}	TUC-JAW
THE STATE OF ARIZONA,	}	MOTION TO RE-
WILLIAM C. COX, SHERIFF,		
Pima County, Arizona,		
Respondent.	}	OPEN EVIDENCE

COMES NOW the State of Arizona and William C. Cox, by and through the Pima County Attorney, DENNIS DeCONCINI, and his deputy, A. BATES BUTLER, III, and requests this Court to reopen this case for the purpose of taking evidence upon the question whether Judge Buchanan believed that manifest necessity existed when he granted the State's Motion for Mistrial in January, 1975. In support of this request, respondents submit the attached Memorandum of Points and Authorities and Affidavit.

Respectfully submitted this 3rd day of October, 1975.

DENNIS DeCONCINI

PIMA COUNTY ATTORNEY

/s/ A. Bates Butler, III

A. Bates Butler, III
Deputy County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

Respondents base this request to reopen this case to take evidence upon the question whether Judge Buchanan believed that manifest necessity existed for granting the January, 1975, mistrial upon the following points: (1) the Court is vested with the authority to reopen a habeus corpus proceeding for the purpose of taking additional evidence, Martin v. Beto, 397 F.2d 741 (5th Cir. 1968), cert. denied, 394 U.S. 906, 89 S.Ct. 1008, 22 L.Ed. 2d 216; (2) the above issue was neither considered nor briefed by either of the parties; and (3) respondents are informed that Judge Buchanan is prepared to testify that manifest necessity did exist for the granting of the January, 1975, mistrial. (Please see attached Affidavit of A. Bates Butler, III.) This court is now respectfully urged to reopen this matter to allow Judge Buchanan to testify on the issue of whether manifest necessity existed.

Respectfully submitted this 3d day of October, 1975.

DENNIS DeCONCINI
PIMA COUNTY ATTORNEY

/s/ A. Bates Butler, III
A. Bates Butler, III
Deputy County Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GEORGE WASHINGTON, JR.,)	
Petitioner,	)	NO CIV 75-85
vs.	)	TUC-JAW
THE STATE OF ARIZONA,	)	AFFIDAVIT OF
WILLIAM C. COX, SHERIFF,	)	A. BATES BUTLER,
Pima County Arizona,	)	III
Respondent.)	

STATE OF ARIZONA)
County of Pima) SS:

I, A. BATES BUTLER, III, being first sworn according to law, state under oath the following:

1. That I am a Deputy County Attorney, Pima County, State of Arizona.

2. That I am the attorney for respondents in the above-entitled action.

3. That on October 2, 1975, after the Court in the above-entitled action stated its reasons for granting petitioner application for a Writ of Habeas Corpus, spoke with Judge Buchanan, the Arizona Superior Court judge who ordered the January, 1975, mistrial.

4. That Judge Buchanan stated to me that his ruling in January, 1975, meant that

there was manifest necessity for granting the State's Motion for Mistrial because of defense counsel's improper remarks in his opening statement.

FURTHER, AFFIANT SAYETH NOT.

/s/ A. Bates Butler, III

A. Bates Butler, III

SUBSCRIBED AND SWORN to before me this 3rd day of October, 1975, by A. Bates Butler, III.

/s/ Laura Coleman
Notary Public

My commission expires:

Oct. 11, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GEORGE WASHINGTON, JR.,)	NO. CIV 75-85 TUC. (JAW)
Petitioner,)	
vs.)	
THE STATE OF ARIZONA,)	
WILLIAM C. COX, SHERIFF,)	
Pima County, Arizona,)	
Respondent.)	

Respondent having moved herein to reopen this cause for the purpose of taking further evidence, and petitioner having filed opposition to the motion, and the court having fully considered the same,

IT IS ORDERED that respondent's motion to reopen evidence is denied.

DATED: October 9, 1975.

/s/ James A. Walsh
United States District Judge

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

RELEVANT EXCERPTS

from the
PARTIAL SUPERIOR COURT TRANSCRIPT of
Washington's Second JURY TRIAL

Dated January 8, 1975

[Partial Transcript also includes
All Arguments and Testimony on
January 9, 1975 and January 10,
1975.]

I. Mr. Butler's Voir Dire

[Page 2]

(Following the selection of 34 prospective jurors and following voir dire by the Court, the following proceedings were had.):

THE COURT: Ladies and gentlemen, I will tell you at this time that in this case the defendant is charged with the crime of murder. However, this is not a death penalty case. The death penalty does not apply in this particular case.

[Page 6-7]

"MR. BUTLER: *** I think the Judge mentioned to you that what we're concerned with here is an event that occurred on the 13th of December, 1970, a little more than four years ago. It occurred at the Arizona Hotel over here on North Sixth. It's 35 North Sixth. Have any of you ever stayed at the Arizona Hotel or had any friends or relatives that have resided at that hotel? Yes, sir?

***O.K. Anybody else? Does the fact that the alleged crime occurred almost, or excuse me, more than four years ago, does that fact and that fact alone cause you to, for one reason or another, be unable to sit as a juror in this case?

GRGICH [Juror]: The only thing it would do it would raise in my mind the credibility of some of the witnesses.

MR. BUTLER: O.K. That's a problem with the passage of time.

Now, the Judge has indicated, at least I think he indicated that the defendant has a presumption of innocence***"

[Page 14-18]

"MR. PLACENCIO [Juror]: Is Mr. Alonzo Rodriguez also charged with murder?

MR. BUTLER: Yes.

MR. PLACENCIO: Even if he testifies, he would still be charged with murder?

MR. BUTLER: He's charged with murder, correct.

Now, as one of the individuals indicated, because it's four years since this crime occurred, they may have a problem in considering testimony because memories fade. You may also see in this case the witnesses, or many of the witnesses that have testified, or will testify before you, have testified in at least two prior proceedings because we have transcripts of what they said four years ago. We know what they said then but as I say, memories fade, what people said four years ago may not exactly coincide with what they say today. Like all of us I don't think can remember everything we said and saw and heard yesterday. We're asking some people to come in here to tell you about things they saw and heard and said four years ago, so there may be some witnesses who make what lawyers call prior inconsistent statements. They said something four years

ago and it may not exactly be the same today.

Because it may not be exactly the same on the witness stand as they made in a prior statement, whenever they made the prior statement, are there any of you that would automatically say, 'That person must be a liar'?

MR. BOLDING: Your Honor, I have to object to this line of questioning. I don't know whether Mr. Butler knows what the testimony is going to be from the witness stand. It appears that he's trying to get the jurors that if a witness lies up there that they'll say it's all right.

THE COURT: Is that the end of your question, Mr. Butler?

MR. BUTLER: That's the end of my question but that's certainly not what I'm asking the jury.

MR. BOLDING: I would ask that be cleared up, your Honor, that's certainly the impression I got out of it.

MR. BUTLER: O.K. Ladies and gentlemen, for Mr. Bolding's benefit and for anyone else's benefit who I caused to have a misunderstanding of what I said, if an

individual gets on the stand and lies, I think you have to disregard what he says. What I mean to tell you is that memories fade. I don't have any more idea than Mr. Bolding has as to exactly what each person is going to say, each word they're going to say. We've all talked to them before but we don't know what everyone is going to say from that witness stand. All I'm asking you is if you will consider the fact that four years have passed. If you find that somebody made a prior inconsistent statement, are there those of you that feel that because they may have made a prior inconsistent statement, that that fact alone means they're lying? Now, you're to consider their demeanor on the witness stand and---

MR. GRGICH: Are you talking about a minor point or a major point?

MR. BUTLER: All right, if it's a minor [sic] point, I think you ought to consider it harshly. If it's a minor point, I'm saying I think minor points the memories fade. If somebody gets up there and turns a ninety degree angle---

MR. GRGICH: Are you just talking about a minor portion of the testimony or a major portion? Obviously, if it's a

a major portion--

MR. BUTLER: Then I think you ought to look at that witness awfully carefully.

MR. GRGICH: That's what I mean, I don't understand what you mean.

MR. BUTLER: I'm talking about is a minor inconsistent statement. I'm not talking about somebody that said the sky was blue on December the 13th and gets up there and tells us today or this week that the sky is red on that date. I'm not talking about somebody that makes a completely opposite turn. If that happens I'll be talking to you about lying. I'm not talking about that at all. I'm talking about somebody that makes a minor inconsistent statement.

Now, you will hear from at least one individual that was in the Arizona Hotel the night of the killing***"

[Page 18-21]

"Now, you will hear from at least one individual that was in the Arizona Hotel the night of the killing, a patron. You may hear, through one means or another, from others, but I suspect that the testimony will reveal that the witnesses, the actual eye witnesses to the robbery are unable to get up in court and point with proof positive that George Washington, Jr., was the robber. The State has other evidence to indicate that. What I'm asking you is this: During an armed robbery or an armed robbery attempt, the use of the term armed robbery obviously indicates that the individual carries a weapon. I think the State will show that the weapon here was a shotgun.

Are there any of you that do not realize that one of the purposes in carrying a weapon during an armed robbery, so that witnesses will be watching that weapon, and not the face of the robber.

MR. BOLDING: Your Honor, this is clearly improper. There will be no testimony like that. This is just outside the record and I'll have a motion to make when we go in chambers. It's just very disturbing that he would use that kind of type of testi-

fyng in voir dire.

THE COURT: Withdraw that question, Mr. Butler?

MR. BUTLER: I think the question, your Honor, was proper and I think the evidence will indicate what I said is what will happen. I think Mr. Bolding's statement that I was out of the record, or outside the record and they won't hear any of that is wrong.

MR. BOLDING: I object to it, it's improper.

THE COURT: I'll sustain that objection. I didn't quite understand that question.

MR. BUTLER: All right. Ladies and gentlemen, let me ask you this, if the eye witnesses to the robbery tell you that they can't say proof positive that George Washington pulled the robbery but if the State introduces other evidence that indicates to you, other witnesses that indicate to you that George Washington committed that robbery which a man was killed, why he's charged with murder, if we prove it through other witnesses, prove it beyond a reasonable doubt, are there any of you that couldn't find him guilty?

MR. PLACENCIO: I don't understand

your question.

MR. BUTLER: O.K., I don't expect people to get up and say, "I saw that man rob, or try to rob the hotel during which a man was killed." The State will introduce other evidence that indicates, I believe, indicates this gentleman killed an individual in the Arizona Hotel during a robbery, but we will not introduce eye witness testimony that he did it.

MR. ELLIOTT: Is the other evidence, is it circumstantial evidence or would it be--

MR. BUTLER: Well, the Judge will instruct you at the end of the case, I anticipate, that you are to consider circumstantial evidence just like direct evidence. And I think we're going to have both circumstantial evidence and direct evidence. All I'm asking you is this: If we don't have an individual that says, "That's the guy that did it because I saw him do it" but if we prove to you beyond a reasonable doubt through other evidence, through other witnesses, through statements, anything like that, that this individual George Washington pulled the robbery, are there any of you that would still say,

"Well, I'm sorry but I'm not going to find him guilty"?

II. Mr. Bolding's Motions for Mistrial
Following Mr. Butler's Voir Dire

[Page 24-25]

THE COURT: Mr. Bolding, you had a couple matters I think you wanted to make a record on at this time?

MR. BOLDING: ***Yes, Your Honor, I do object to the fact that the Court did advise the prospective jurors in voir dire that this is not a death penalty case.*** They think the penalty is something but they don't know what it is and that's, I believe that taints the jury, prejudices the jury and I move for a mistrial on that basis.

Secondly I want to make a motion for a mistrial because of the fact that Mr. Butler stated that there were proceedings in this case four years ago and that there would be transcripts from four years ago and witnesses who testified four years ago. The only reading, of course, from that is that there was a former trial in this matter, and, of course, with a former trial and the fact that George is in custody and in the accompaniment of the Sheriff at this time and in the Pima

County Jail, that leaves the jury no alternative but to know there was another trial four years ago in 1970. Their only deduction could be that there was a finding of guilty at that time and that something happened in the intervening time and we have another trial.

Bate's words were that there were proceedings four years ago and we would request the Court to have those words read back by the court reporter in order to make a determination in that area and we make a motion for a mistrial based on that also.

Our third matter ***"

III. Mr. Butler's Response to Mr. Bolding's Motion for Mistrial Based on His Mention of "prior proceedings", and Judge Buchanan's Ruling.

[Pages 27-29]

THE COURT: Zeke [court reporter], would you read back there where Mr. Butler made mention --

(Portion of record read by the reporter.)

MR. BUTLER: ***As [sic] far as the second motion for a mistrial, it kind of surprises me that Mr. Bolding--well, I guess it shouldn't surprise me, he made the motion, but I think it's kind of novel in that Mr. Bolding has already indicated, I believe to the Court, and I know he's indicated to me that he's going to attempt to use a transcription of one Luke Murray from the last trial. I assume that when he does that he is not going to use the word trial, probably will use the word prior proceeding.

We also have a preliminary hearing here, we have preliminary hearing transcriptions. In the testimony of Mr. Murray at the last trial, extensive use was made of the preliminary hearing transcript,

used by Mr. Cooper in his cross-examination of Mr. Murray, so in the testimony of Mr. Murray alone, it's going to come out (1) he's testified, we've got him down, his testimony, and (2) in that testimony or in that transcription, they talk about the preliminary hearing, which is the second prior proceeding I talked about.

We have--the Washingtons are going to testify, three of them. We have Marquex is going to testify, Bruck will testify, Bunting will testify, Pershing will testify. All those individuals testified before and I think that it's ludicrous to assume that these individuals memorized what they said four years ago. I think it's ludicrous to assume that they're going to say exactly the same thing they said four years ago, and I think it is highly likely that either Mr. Bolding or myself will use these transcripts to refresh their memory or to impeach them, also Mr. Grant.

***In my talking to the people, they're saying that they are not as clear on it today as they were four years ago. Therefore, it's going to be imperative to ask them, to refresh their memory with the prior transcripts, or with the

transcripts. The only thing you can call them, I think, without avoiding error, is a prior proceeding, and I don't think there's anything at all improper in what I said.

Now, as far as the priors***"

[Page 33-34]

"THE COURT: Motion for mistrial regarding advice that this is not a death penalty case is denied.

The motion for mistrial regarding the reference to the four-year-old transcripts is denied."

* * *

THE COURT: Mr. Butler, you want to make, for the record the proceedings had in chambers, or your motion to preclude the defense from mentioning the penalty involved?"

PAGINATION AS IN ORIGINAL COPY

MR. BUTLER: Yes, your Honor. At this time I would request that Mr. Bolding and myself be precluded from mentioning punishment to the jury because it's the position of the State the jury is not entitled, under the present status of the law, to consider any possible punishment and it would be impermissible for Mr. Bolding or myself to get into that. It's my understanding that, off-the-record in chambers, Mr. Bolding was instructed by the Court not to discuss it and Mr. Bolding indicated that he would discuss it anyway and then Mr. Bolding indicated he would try to handle it so that he was not held in contempt.

I would simply at this time, your Honor, request that your instructions to Mr. Bolding be put into the record as far as his being allowed to or not allowed to comment on possible punishment.

THE COURT: Mr. Bolding, you made a previous record on the grounds for that, I think, but you can go ahead if you want to make any additional record on that.

I am entitled, therefore, to tell the jury that this is a case in which, if Mr. Washington is found guilty, that he will be sentenced to a life term in prison, at the discretion of the jury and, therefore, I feel that the motion should be denied as I've argued in chambers and that because this is a case which involves a person, a case that involves some rights to this person, a case that should be tried fairly not only from the State's standpoint but the defendant's standpoint as well. And because primarily the prosecution has evidenced over this course of four years that they are not fair and that they are not going to be fair. I think that the Court should bend over backwards to make sure that the prosecutor is fair to this person and deny this motion and allow me to argue what the law is and what the law is going to be, and that is that if this man is convicted, that he's going to get a life term in prison, a natural life term. And if I'm precluded from arguing in that nature and precluded from voir diring the jury in that manner, this man has been seriously deprived of his rights under the law and although the

County Attorney has evidenced the fact that they do not care about this, I do care and for that reason, we say that the Court should grant the motion--or should deny the motion presented by the County Attorney and should allow me to voir dire the jury in that respect.

THE COURT: Thank you. State's motion as previously indicated is granted. Defense counsel are directed not to go into the matter of the sentencing in this case in the event of a conviction.

Please call the jury.

MR. BOLDING: I'm moving at this time for a mistrial, your Honor, based on the Court's ruling. I cannot get a fair trial, the jury is being prejudiced by the Court's statements and I move for a mistrial and ask, since no evidence has been presented at this time, since all that we've done is call the list of jurors, since the Court and the prosecutor are the only ones who have now voir dired the jury, I move for a mistrial, ask that a new jury be called and that the matter be reconsidered by this Court.

THE COURT: Motion is denied.

IV. Mr. Bolding's Voir Dire

[Page 44]

"(Following proceedings were resumed in open court, another roll call of the jurors and voir dire examination of prospective jurors by Mr. Bolding, whereupon a recess was taken and several jurors called in and questioned individually by the Court and counsel and another recess was taken for the purpose of allowing the attorneys to strike prospective jurors.)"

[Voir Dire examination of the prospective jurors by Mr. Bolding is included in a separate transcript of sixty-two pages, also dated January 8, 1975, which transcript was lodged with this Court on or about May 26, 1977, and is referred to in Petitioner's Brief as Exhibit 1.]

V. Excerpts from Mr. Butler's Opening Statement to the Jury

[Page 50-51]

"***Now, you heard the Clerk read the information. George Washington is charged with the crime of murder in the first degree. The State has alleged through the vehicle of the information that that event occurred on or about December 13, 1970, and I say George Washington, Jr. I know what his name is. I guess Mr. Bolding has forgotten mine. My name is Bates Butler. It's a trick, he called me prosecutor, I call him defense attorney. We all have names and we all know it.

The information which was read to you brings the case to you for your consideration. The posture is, and you will hear that witnesses have testified before.

Mr. Bolding has indicated they testified at a trial. You will also hear evidence that witnesses testified at a preliminary hearing. A preliminary hearing is in front of a magistrate. As the State presents its evidence and a result of that hearing, the Judge considers the evidence, makes a decision and the result

of his decision, the information is filed.
This is as opposed--

MR. BOLDING: Your Honor, I object, of course, that's going to be outside the record and I'd like an opportunity to make a motion at a recess.

THE COURT: The record will reflect your objection.

MR. BUTLER: You will hear witnesses that have testified in a trial and have testified in a preliminary hearing, that's what a PH, preliminary hearing is. Now, the law we're talking***"

[Pages 54-55]

"Mr. Bolding has mentioned that Mr. Washington has been in prison. So has Mr. Sanford. They met there, or at least they knew each other there***"

VI. Excerpts from Mr. Bolding's
Opening Statement to the Jury

[Page 61-62]

"***I tried to make a few notes of what Mr. Butler said he would prove. You're entitled, incidentally, once the evidence begins, you're entitled to make notes, entitled to get a note pad from Andy, my friend Andy over here, our friend Andy over here, a note pad and take some notes of some of these things that might be of interest to you.

MR. BUTLER: Judge can we approach the bench.

THE COURT: I think that's a matter that hasn't been determined by the Court yet in this case. I'll take that up.

MR. BOLDING: I may be overruled on that, I'm sorry. I'm sorry, your Honor, I'll approach that later.

O.K., what's going to be proved? The prosecutor told you some things that he thought were going to be proved and it was very interesting to see that he left out a lot of things that even his witnesses are going to prove to you. And isn't it strange that all of the things that he left out are what we call exculpatory matters,

exculpatory, not--exculpatory matters will be matters that would show that George didn't have anything to do with the shooting at the Arizona Hotel. I don't know why he didn't mention a lot of these things unless it's just kind of that he doesn't want to bring out to you those things that will be mentioned that will show that George didn't do this shooting even though, as he promised yesterday, he will not require that George show you any evidence that he didn't do it.

Here's what will be proved, and that is that there was a shooting at the Arizona Hotel on December 13th, 1970 at about 9 o'clock.***"

[Page 65-66]

"MR. BOLDING: ***the shooting I think you will find out happened on December the 13th***Two hours later, two hours and five minutes later Mr. Choat signed a statement, looked at it, read it, thought about and said, "There is no doubt in my mind but what I could identify the man who did the shooting."

Why wouldn't Mr. Butler want you to hear that? 'There is no doubt in my mind but what I could identify the man

who did the shooting.' Well, I think one of the reasons that Mr. Butler--

MR. BUTLER: Your Honor, I'm going to object to this form of argument.

MR. BOLDING: It is argument and I apologize. I withdraw that, sorry, my fault.

We think the evidence will show***"

[Pages 68-69]

"I think you'll hear Sergeant Bunting's words to this effect, that Mr. Choat stated that he thought all of the participants in the lineup sounded like Mexican males except for No. 1 and No. 6. This was after Mr. Choat had identified No. 1 as being the man who said the words that night. Sergeant Bunting, we think you'll hear--we know we'll hear evidence, that at the last trial he stated that he didn't say this but at this trial he'll have to admit that he said this, that he told maybe a little white lie on the witness stand the last time around, said that No. 6 was occupied by George Washington, Jr., whereupon Mr. Choat said, "Well, No. 6 would be my alternate selection." O.K., you'll hear that testimony. You'll hear that from Mr. Choat, that the man that did the shooting the night of the Arizona Hotel, did not have a mustache. Look over here. You'll hear testimony that George Washington, Jr., except for losing a little hair up here on top, George looks exactly like he did on the night of December 13th, 1970, exactly. That's the testimony you'll hear from Sergeant--from Larry Bunting, no less, and from Delbert Choat

no less, "Yeah, we looked at George that night and he looked just like this."

Delbert said that night that the man that did the shooting did not have a mustache.

O.K. Another eye witness you'll hear from and some of this testimony, incidentally, as we mentioned before will come from books like this, transcript of that last trial. For reasons you'll hear--you'll hear testimony that Luke Murray, Luke Murray is dead. Luke Murray was a eye witness and luckily, we had his testimony from the last trial and you'll hear testimony from him, from Luke Murray that says that as he looked at this man, "George, as I look at you, he says, "This is not the man."

[Page 71]

"You'll hear from George Archeletta as prosecutor Butler told you. You'll hear that he picks out a car that was in the back of the Arizona Hotel and about the time that this incident took place, 9 o'clock on the night. ***He's going to tell you that he saw a man come down--

oh, park the car, go up into the hotel and come back down, that he saw no face. He can't identify any person, didn't see a face. Now, how in the--restate that, how in the world he's going to tell you that the man he saw was black when the night was black --

MR. BUTLER: Your Honor, I'm going to object to argument.

MR. BOLDING: O.K. I'll restate that. If you hear that type of testimony***"

[Pages 73-74]

"And we are going to attempt to bring you testimony from a Mr. Frank Bibble, who will tell you that the car that he saw--

MR. BUTLER: Your Honor, I'm going to object to this. Can we approach the bench at this time, Your Honor? I'm sorry, I have to approach the bench.

(off-the-record discussion at bench between Court and counsel.)

MR. BOLDING: We think that you will hear testimony and we are going to attempt to bring you testimony from a Mr. Frank Bibble who said***. That testimony was not available at the last trial, we think

you will hear.

You will hear testimony from a man named, its attributable to a man named James Holt who was an eyewitness to this killing which was not available at the last trial, and that testimony will***"

[Page 78]

The same detective who arrested George on the night of December 13th, 1970, you'll hear, who came to the Esquire Bar where George was sitting having a drink after having spent the entire day, you will hear, with a person named Werle Wilson's house, a friend of George, she and her children. You'll hear Werlene's testimony, not from the last trial but new testimony, that George although this testimony was available at the last trial, but George didn't testify at the last trial and he will testify at this trial, so you will hear testimony that he spent the day at Werelene's house***"

[Pages 80-81]

"Well, that not being enough, we think you'll hear Detective Bunting said to George, "Hey, George let's go down to the

station, go down to the station house here. Would you go down there, we think you did a shooting over here at the Arizona Hotel, and we have a witness down there, George, at the Arizona Hotel that's waiting to identify somebody and we think he can identify somebody and will you go with us down to the police station to be identified by this person at the Arizona Hotel?" and George says, "Sure" knowing that, you know, it's an absolute impossibility for anybody to identify him as being there because he wasn't there, so George goes with him and since George goes with him voluntarily, Detective Bunting is of the opinion that he didn't arrest George that night although what do you suspect might happen if George had said, "No, I don't want to go down there with you?" but at any rate --

MR. BUTLER: I'm going to ask that be stricken as improper argument.

THE COURT: Motion is granted, the jury is admonished to disregard that.

MR. BOLDING: At any rate -- I'm sorry, Your Honor -- at any rate the testimony you will hear that George voluntarily let the police look in his car***"

[Page 82]

"We think you'll hear that this is not what you would call a normal and usual family relationship in that we think you'll hear that George Washington, Senior, looked at this man to whom he had given his name, George Washington, Jr., when he was seven years old, and kicked him out of the house. And we think you'll hear from the testimony that George had done some things that he's not proud of and he served some time in prison--he didn't want me to tell you that. That he served some time in prison and that at no time, anytime, anywhere within the past eight or ten years before this incident supposedly happened***"

[Pages 89-92]

"Who else are you going to hear from? Another very interesting person name of Al Rodriguez, who is guilty, testimony that you will hear is that he is guilty of first degree murder in the shotgun shooting of a clerk at the Arizona Hotel on the night of December 13, 1970. He's guilty of that murder.

You'll hear that on the night of December 13th, that Al Rodriguez told at least five people, and maybe six people, and signed a statement just like Mr. Choat did--big file on him--signed a statement saying that the man that did the shooting on the night of December 13, 1970, was a man who spoke with no negro accent, was a person who said "Quemato." What does that mean? You'll hear testimony, I think, that that word means, what, look out, I will kill you or something like that, that the man that did the shooting was light complexion. You will hear testimony that says that Rodriguez said the night of this killing that he was positive it was a Mexican male, that Rodriguez was positive it was a Mexican male, that Rodriguez was positive that the man spoke with a Spanish accent and is positive the suspect is Spanish, six or seven times. New evidence.

You will hear testimony that he signed the statement to this effect, that he left. You will hear testimony that notwithstanding the fact that we had a trial in May of 1971 in this matter, that the prosecutor hid those statements and didn't give those to the lawyer for George

saying the man was Spanish speaking, didn't give those statements at all, hid them. Not this prosecutor. Prosecutor who has been taken off this case.

You'll hear testimony that Mr. Rodriguez was next seen in Salina, Kansas, in October of 1974. Coincidentally and ironically, you will hear just after a new trial had been set for George Washington, Jr., suddenly he's found in Salina, Kansas, you will hear. You will hear that Larry Bunting went to Salina, Kansas, and talked to Mr. Rodriguez and that for seven, eight, ten, fifteen minutes Mr. Rodriguez said, "No, I didn't have anything to do with it. No, it was a Spanish speaking guy. No, it was a guy that said Quemato. No, it was, you know, the night of the shooting you talked to me and everything I said is true the night of the shooting and you showed me a lot of pictures and you showed me pictures of everybody and no, you didn't show me any pictures of the killer."

Whereupon you'll hear testimony that Larry Bunting whips out a picture of George, ironically, and says--and we think you will hear the testimony is--

that Sergeant Larry Bunting whips out a picture of George Washington, Jr., and says, "Listen, we have your partner in this case. This has been convicted of the shooting and is not getting a new trial and we have enough evidence on you, Rodriguez, to where we could turn this man loose." Whereupon what does Rodriguez say: "Oh, well, O.K., that's the guy but he didn't have a mustache." Poor Larry's heart did flip flop I'm sure at that time.

MR. BUTLER: Objection, improper argument, your Honor.

MR. BOLDING: I think the testimony will show that Larry Bunting was quite shocked at that and so we think the testimony will show, then, that Mr. Rodriguez was brought back here and will be here to testify for you.

Could we approach the bench for just a minute.

(Off-the-record discussion at bench between Court and counsel.)"

[Pages 92-93]

MR. BOLDING: We think the evidence will show that Mr. Rodriguez admits to his part in the shooting and says that the man that did the shooting, of course, he

doesn't recognize anybody that did the shooting, he will say. He will say that he drank with a man all day and planned a robbery of the Arizona Hotel and that he was drunk and that he was confused and that he drank with four men all day and at first he will tell you that he can't recognize anybody else except this man right here, George Washington, and then he will tell you, "Well, that's a lie because I did recognize another one of the men that I was drinking with, a Chicano who I saw four days later and told him 'Hey' "you know, or whatever, saw him four days later, so, but he can't remember anything except conveniently.

MR. BUTLER: Objection, your Honor, to the word conveniently. I apologize to the Court --

THE COURT: Sustained.

MR. BUTLER: --but I'm tired of doing this.

MR. BOLDING: Except that he remembers only George, or the picture of George, and George, he will say he remembers George I think, except that George did not have a mustache on the night of the shooting.

Please keep in mind that you will

hear testimony from many people that George has always had a mustache."

[Pages 93-96]

"You will hear evidence that will show you that there was another eye witness in this case. You will hear evidence that will show another person named James Hanrahan was an eyewitness to this case, to this shooting. You will hear that James Hanrahan describes the man who did the shooting as being a large negro male with an afro, with no mustache, and you will hear that James Hanrahan said [sic] this man is not the man. That evidence you will hear was not utilized at the last trial. You will hear that that evidence was suppressed and hidden by the prosecutor in that case. You will hear that that evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case. That's what you will hear.

You will hear that through this testimony, that the wrong man was convicted.

You will hear through this testimony from George that he spent four years, two days and eight hours incarcerated for something that he did not do.

We would ask that each of you keep an open mind as you're listening to the testimony as it comes from the prosecutor. We would ask that you keep an open mind because George, through his lawyers, me and John, do not -- we do not have a way to get to you our testimony yet. The prosecutor puts on his testimony first and will put on essentially what he's told you but listen to what I've told you. You told us yesterday that you would be fair and unbiased. You told us you would be open minded. Listen to all of the evidence as I've told you it will come out. If it If it doesn't come out like that, hold it against me, hold it against me.

That is the evidence. That is what the evidence really is. We ask that you keep an open mind We ask that after all of your consideration of the testimony that you think about this man and we ask that after you hear the testimony, that you remember your duty. We feel that the evidence will show nothing except that

George Washington, Jr., is not guilty.

THE COURT: Thank you, Mr. Bolding.

MR. BOLDING: Thank you, Your Honor.

THE COURT: Ladies and gentlemen, we will take the noon recess at this time until 1:30 this afternoon. Please remember the admonitions that I gave you last evening about not discussing the case.

Apparently, I misspoke last night that you were not to attempt to view or visit the scene of the homicide in this case, which you should not do, so until 1:30, stand at recess."

VII. Mr. Butler's Motion for Mistrial and Argument Therefore Following Mr. Bolding's Opening Statement to the Jury on January 9, 1975.

[Pages 96-97]

(NOON RECESS)

(Following proceedings held out of the presence of the jury):

THE COURT: Mr. Butler, you indicated that you have a motion to make outside the presence of the jury?

MR. BUTLER: Yes, Your Honor, I have. I'm going at this time, Your Honor, to move for a mistrial based on the misconduct of Mr. Bolding in his opening argument on several grounds. He was repeatedly told by the Court to avoid arguing, He did not stop arguing, he continued to conduct an improper opening argument and I would object and, my objection would be sustained but it didn't slow Mr. Bolding down one bit. It's improper. That's my first ground for a mistrial.

My second one is, Your Honor, Mr. Bolding in his argument kept talking about evidence that was hidden from the defendant at the last trial. He talked about, I think his words were something like, "George

Washington could not possibly be the man" and went on to say there was another eye-witness in that case, James Hanrahan, who describes the robber and killer as a large negro male, with an afro, no mustache. Then he said Mr. Hanrahan, he said in looking at George Washington, Jr., "This man was not the man."

Mr. Bolding then said that evidence was suppressed, hidden, purposely withheld by the prosecutor at the last trial and then he said gratuitously that it was not me, I was not the prosecutor. And then he went on to say, your Honor, that is the reason for the new trial. He then said, if my notes are correct, your Honor, that the Supreme Court of the State of Arizona granted a new trial because of the prosecutorial misconduct in the last trial. Mr. Washington then spent four years, two days and eight hours because of that misconduct.

And then Mr. Bolding said, Your Honor, "If I haven't said anything -- if I don't prove any of the things that I've said, hold it against me, not George because that is the evidence. That's what the evidence really is. In other words,

the Judge may not let that in but that's what the evidence is, ladies and gentlemen."

He made that statement, your Honor, knowing he could not prove it. Your Honor, he put on evidence of what Frank Bibble said, what James Holt said. Those witnesses are unavailable to testify, anything that they said to anyone is hearsay. He can't get that in. He knew he couldn't get it in when he made the statements but he says it anyway. In other words, Mr. Bolding is going to prove his case in his opening argument whether he gets the evidence in or not because the jury heard it and that's all he's after.

Because of those reasons, your Honor, I am asking for this mistrial. I don't want to. I've got my witnesses here and they don't know about the motion for the mistrial except for one of them and he was appalled, but I told him I didn't have any choice because of Mr. Bolding's misconduct.

The other problem is this, Your Honor, if the motion for mistrial is not granted, I am going to be forced to go into the matters that Mr. Bolding says

he's going to show about how the reasons for the new trial. If I am forced to that, I will have to call the individuals who I just subpoenaed over the lunch hour, and these individuals are: Judge Robert Royston, Judge Richard Royston, Deputy Sheriff Melvin Hill, Eugene Davis, Randy Stevens, Rick Cooper, Dan Stokall, and I would attempt, your Honor, through their testimony to prove that Mr. Bolding was guilty of subornation of perjury, and I don't like making that statement but I'm forced to, your Honor, because that's the way this trial is going.

Mr. Bolding does not want to try George Washington, he wants to try what happened four years ago in the handling of this case by the County Attorney's office. That issue has been decided by the courts. That issue should not be tried at this time but Mr. Bolding has done everything he can to throw it in and he can't prove it, your Honor, because it's all incompetent evidence. It's got nothing to do with this case. Thank you.

VIII. Mr. Bolding's Response to Mr. Butler's Motion for Mistrial on January 9, 1975.

[Pages 99-102]

THE COURT: Mr. Bolding?

MR. BOLDING: Your Honor, I didn't realize I was touching such a nerve. My argument, my opening statement this morning was direct at what I will -- what I believe the evidence will show. I said nothing this morning that I don't believe the evidence will show, in other words, everything that I've stated I believe at the end of this trial, I would have shown or I wouldn't have argued that. I wouldn't have made that in my opening statement.

I will be showing that evidence was hidden. I will be showing that the prosecutor had some of this evidence and didn't divulge it to Mr. Washington or his lawyer at that time. This argument -- that's what the evidence is. What I think, in context what the argument was, if that's what the evidence is, that's what the evidence is that you will hear, that's the type of evidence that will be presented to you by me.

I don't know what Mr. Butler's talking about, unavailable to testify. I know of -- I guess that's something else that they've withheld from me because I don't know that some of these witnesses are unavailable to testify. I am looking for some witnesses actively. I'm still looking. As the Court remembers, I made a motion to continue based on the absence of Holt and Bibble. I am still actively looking for those people and I anticipate by the time my case, my time comes around to put them on, I hope to be able to present them at that time. If not, this jury can consider that fact that they haven't testified. I hope to be able to have them here and I honestly do hope to have them here.

Mr. Butler, I don't care about subpoenaing Robert and Richard Royston, Mel Hill and Bud Davis and Stevens and Cooper and Sokoll. That's great because if he hadn't subpoenaed them, I would anyway. I just didn't do it in advance because I didn't want to tip my hand to the prosecutor and that's exactly the type evidence that is going to be presented in this case. You know, if he wants to prove that I've committed the crime of subornation of per-

jury, subornating perjury, rather, I guess he's free to do that if he wants to issue a complaint, if he wants to take me to the grand jury, I guess he can do that. You know, it didn't happen, everybody knows it didn't happen but if he wants to attempt to do that, that's fine too.

I said nothing this morning, Your Honor that I did not honestly intend or think that I could prove in the way of evidence, and as I understand it, that's what an opening statement is for, so that you can tell the jury what will be the evidence.

I do apologize, there was some argument and I did go on a couple of occasions at the time Bates called me on it, that's true, and I apologize for that. I intend in any opening statement that I made to show what evidence I will present and I have tried to show this jury what evidence I will present and I believe my prediction is by the time this case is over, that is the evidence that's going to be presented specifically and exactly, the words that I quoted, and so I see no basis for a mistrial at this time, your Honor.

IX. Colloquy Between Judge Buchanan,
Mr. Butler, and Mr. Bolding
Regarding Mr. Butler's Motion
for Mistrial on January 9, 1975.

THE COURT: What were your specifics, Mr. Butler, as you enumerated them on the misconduct of the County Attorney's Office, what the Supreme Court did in this case.

MR. BUTLER: Also as to what Mr. Hanrahan would testify to or would say as far as he was an eyewitness and he gave a description which Mr. Bolding went through, of the robber.

THE COURT: Why don't you start from the top, then, other than the improper argument.

MR. BUTLER: O.K., Your Honor, I think the first thing I indicated was Mr. Bolding, the way my notes reflect, went like this. He said, George Washington could not possibly be the man." He said there was another eyewitness in this case, James Hanrahan, mentioned his name. He said James, or "Mr. Hanrahan describes the robber as a large negro male with an afro, no mustache." And when Mr. Bolding said that James Hanrahan said in looking at this

man, Mr. Washington, "This man was not the man, was not the robber." Mr. Bolding then said that evidence was suppressed, hidden, purposely withheld by the prosecutor and then he said--

MR. BOLDING: I'm sorry, Your Honor, could we take these one at a time.

THE COURT: That's what I'm trying to do.

MR. BUTLER: I'm sorry, did I go too far?

THE COURT: No, I thought this was-- are you objecting?

MR. BOLDING: All one?

THE COURT: I thought it was.

MR. BUTLER: It is all one, your Honor.

THE COURT: You're saying that he's not going to be able to prove what Hanrahan said and what Hanrahan saw and how Hanrahan identified Mr. Washington, or failed to identify him?

MR. BUTLER: That's correct, I am.

THE COURT: On what basis?

MR. BUTLER: The basis that one, Mr. Bolding when he gave us his list of witnesses, did not give James Hanrahan as a witness. That name was never mentioned

to the jury. He knows where Mr. Hanrahan is. He's known, I've told Mr. Bolding in the month of November that Mr. Hanrahan was in jail in Los Angeles County. He's never asked me for any additional material as to where he is. He has not, to the best of my knowledge, sent any subpoena or asked any court process to take place to bring Mr. Hanrahan here.

THE COURT: Have you done that Mr. Bolding?

MR. BOLDING: The answers to these specific questions, have I sent subpoenas?

THE COURT: Yes.

MR. BOLDING: Yes.

MR. BUTLER: He subpoenaed James Hanrahan?

MR. BOLDING: That was not the question that was asked.

MR. BUTLER: That's what I'm --

THE COURT: That was my question.

MR. BOLDING: My question is, I have issued subpoenas, people are looking for Mr. Hanrahan, there are currently existing subpoenas out for Mr. Hanrahan, yes. This evidence will be presented, your Honor.

THE COURT: All right, go ahead, Mr. Butler.

MR. BUTLER: Well, your Honor, then I would simply ask --

THE COURT: How can I go beyond that representation, Mr. Butler.

MR. BUTLER: Well, your Honor, I think it's a fraud because Mr. Bolding knows where he is and there's an easy way to find Mr. Hanrahan and have him brought back. Now to say he has subpoenas out, fine. If he has subpoenas out, I assume, therefore, that they have been sent to Los Angeles County and they've got a Judge, he's asked a Judge over there to have him ordered back here habemus optimum testem confitantes areum [sic]. I wonder if he has done that because he knows he's in custody. I told him he was in custody. I told him the charges he was in custody on. To say he's got subpoenas out, fine, Judge, but it doesn't mean anything if you don't send them to any place where they can find him, and he knows or has a reason to know where that man is. And without James Hanrahan, I don't think he can get that stuff in because it's all

hearsay.

THE COURT: Let's do it this way, the only way I can keep it straight is point by point.

MR. BOLDING: Your Honor, I avow to the Court that there will be testimony offered and I firmly believe admitted, of everything that I stated this morning including the statements attributable to Hanrahan. I honestly and sincerely tell the Court that this is not a fraud. I honestly and sincerely tell the Court that Mr. Butler is going to be sorry for the remarks that he made because he's going to find out that this testimony is going to come in and, if he's going to be there, Your Honor, and that that's as far as I'm I think required to go at this time.

THE COURT: Mr. Butler, what was your next point on Hanrahan?

MR. BUTLER: On Hanrahan?

THE COURT: Yes.

MR. BUTLER: Your Honor, I'm assuming from what Mr. Bolding said he's avowing James Hanrahan will testify.

THE COURT: He hasn't said that.

MR. BUTLER: Well, that's what

worries me, Judge, because that's the only way you can get into evidence, properly get into evidence what James Hanrahan saw. You can't get in what somebody else, if Bunting was told something by Hanrahan or if Bolding was told something by Hanrahan, you can't get that in, Judge, it's hearsay.

THE COURT: I appreciate that, but there's so many hearsay exceptions and hearsay inapplicable provisions that how can we say at this point.

MR. BUTLER: I would request, Judge, because I frankly, don't want to go through three or four days of testimony to find out that Mr. Bolding cannot produce what he says he's going to produce. I would request that he put on an offer or proof at this time or at least explain what legal machination he's going to engage in to get this testimony in because it is clearly all hearsay without James Hanrahan and I know of no exception that would allow it in.

THE COURT: On the state of the record on this, it seems to me that on any particular witness's testimony that if the attorney tells the jury, "I'm

going to call a witness and he's going to say this and this or we're going to prove this, he said this and this and this" can you challenge that on a motion for a mistrial and say there's no way in the world he can prove that and does the Judge have to make that determination at this point of the trial?

MR. BUTLER: I think that would be the proper thing for this Court to do at this time. If it's a situation, Judge, where it just can't happen, and I think that's what Mr. Bolding has set up. The problem, Judge, is he's already told the jury those things and the Court can say to the jury at the end of the case when that evidence is not introduced, disregard that. Mr. Bolding's already told them, Disregard it, hold it against me" But then he has the audacity to say, Judge, Hold it against me and not George because that's the truth and that's what the evidence really is." I don't think I'm misinterpreting what he's saying. What he's saying is, "I may not get that in, it doesn't matter, ladies and gentlemen, because that's the truth and I know that's the truth. The Judge may not let you hear it for one legal reason

or another."

THE COURT: Which is an improper argument.

MR. BUTLER: And I think that's just wholly -- you think that's proper, Judge --

THE COURT: No.

MR. BUTLER: Or improper. No, that's what I say, I think it's wholly improper and I'm sure if the court reporter would read it back, that's what he said.

The other thing is, Judge, if we get in and bring all these witnesses in, what is going to happen is what was our fear from the beginning, and that is Rick Cooper is going to have to be a witness and Ed Bolding is going to have to be a witness because Ed Bolding talked to Hanrahan before the police did about this matter and he just told certain things, or he says he was told certain things by Mr. Hanrahan, and Ed testified about those things at the motion for a new trial.

Mr. Cooper is not on this case not because he was removed but because he feared he might have to testify. That was the same fear we expressed when Mr.

Bolding was reappointed, that he might have to testify.

I don't see how, if we're going to get into that, you can't -- it's just going to open those doors and all the people that I mentioned are going to have to testify. Mr. Bolding is going to have to testify because this guy Hanrahan, Judge, told a story to Bolding, he told a story to Bunting. He's told a different story to Dan Sokoll. He's told something to Mel Hill and Bud Davis, all these people testified, and if he's going to come in and testify, the State has a right to impeach him. The way we can impeach him is by putting all these people on the stand to whom he's told inconsistent statements. Mr. Bolding is one of them, so we're down the road, a week into the trial and then this happens. That's why I think at this stage of the proceedings it's incumbent upon the defense to indicate to the Court what it intends to do because I know this Court-- I don't want to -- I don't want to move for the mistrial because I want to get the trial on, but I feel I have to at this time because of what Mr. Bolding's done.

These other witnesses, Bibble and Holt, I know the subpoenas are out. We don't know where they are and I suppose we'll have to accept Mr. Bolding's statement that he figures he's going to get that in, but if those people aren't here, everything they said, that's hearsay because there's no exception I can think of to get it in, and I studied this carefully, Judge, because I was afraid this was going to happen.

MR. BOLDING: But --

MR. BUTLER: Go ahead.

MR. BOLDING: If it please the Court, your Honor, I'm willing to make this offer and that is I'm honestly trying to represent Mr. Washington. I am willing to go into chambers with the Court and with the reporter to tell the Court my strategy in this case, to tell the Court what I intend to do. If the Court agrees now that I am wrong and that I cannot do what I tell the Court that I can do, then I'm willing to say I'm wrong and you should grant a mistrial.

I am not willing to divulge that information to the County Attorney at this

time. The County Attorney has made a game of this case from December the 13th, 1970. They have tried to get at me through George. They have tried to get at me through Hanrahan. They have tried to -- they have hidden evidence as the Court knows and it's on record with the Supreme Court, they've hidden evidence. They have withheld evidence, they have not divulged -- they have made it a game, your Honor, I am willing to divulge to you my intentions in this regard. I stand by my previous avowal and I am willing to divulge to you, in the presence of a reporter, whatever -- I will answer whatever questions you ask me. Other than that I don't think I can be forced, at this stage in the trial, to divulge what I anticipate doing in this case, your Honor.

THE COURT: Mr. Butler, what was your next point on proving the -- hiding the evidence? How are you going to get in the evidence of the reversal as evidence? What materiality does that have? The whole door's been opened somehow.

MR. BOLDING: Sir?

THE COURT: I say the door's been opened in the opening statement and voir

dire to the jurors.

MR. BOLDING: In voir dire, of course, Mr. Butler talked about the proceedings four years ago, the previous proceedings, talked about the preliminary hearing and so obviously the door has been opened on that and the only way I know to rebut that is to prove what was done and one part of that proof, your Honor, is going to be is that I am going to offer into evidence the ruling of the Supreme Court in this case, State of Arizona versus George Washington.

THE COURT: What does that rebut?

MR. BOLDING: I'm sorry?

THE COURT: What does that rebut?

MR. BOLDING: Your Honor, that doesn't necessarily rebut, it shows, it corroborates that there is motive and bias and, I don't want to say illegal conduct, misconduct on the part of the County Attorney to show that that lends some credibility to the evidence that was withheld, your Honor, and then, of course, there are cases on that where I can show motive and bias of the prosecutor in a case and show misconduct on the part of the police and show misconduct in order

to get that type of evidence to the jury, and so my anticipation is I will mark and I will do it now except I don't have a clean copy. That's the only copy that I have that I put on the bench. I will be offering that into the case if Mr. Butler says that that's not the best evidence, that's hearsay, then I anticipate that I will subpoena the author of that opinion as well as the other members of the Supreme Court to testify in this regard.

MR. BUTLER: Judge, may I be heard.

MR. BOLDING: And I'll prove it that way and/or I will prove it by Mr. Stevens, Mr. Cooper, by, I guess that's about it, your Honor.

MR. BUTLER: Judge, it escapes me as to how the Supreme Court decision in this case or how a ruling of Judge Truman is in any way material to the issue that the jury is to decide, and that issue is the guilt or innocence of George Washington, Jr. The Supreme Court and Judge Truman have said, "Supply certain evidence to Mr. Bolding." That evidence has been supplied. Mr. Bolding then has the opportunity to utilize that evidence, if he can. That's his remedy, but what he's going

to try to do, and it's obvious by his argument about four years and two days and eight hours. What he wants that jury to do is say, "Look, this guy has spent that long a time in prison because the prosecutor is guilty of misconduct" and so, "You shouldn't find him guilty now."

All of that stuff, Judge, is absolutely totally immaterial to the guilt or innocence of George Washington. He has, Mr. Bolding has the evidence he says was withheld. He has more now because he's gotten a log of things I was not required to turn over to him.

The only reason he can want that in is to get the jury so mad at the State, they're going to say, "Well all right, George has suffered enough and even if he's guilty, we're going to let him off and find him not guilty" because that evidence is totally immaterial to the issue at hand. That's a whole different issue he wants to have heard in this Court, that he wants this jury to decide.

MR. BOLDING: Your Honor, please the Court, it's totally material, totally, it corroborates the evidence that will come forward on the stand, the evidence that

will be brought to the jury. Mr. Butler has cast the inference, your Honor, in his voir dire and the Court heard it, about the four-year-old proceeding, the two proceedings four years ago. I had to, then, go into the fact that the jury knows, then, that there was a trial. The jury knows obviously the man was not found not guilty and, therefore, I have to go into it. And to cast the inference that there's a trial, I have to show them the reason. I can picture it if I don't go into this type of information, I can just picture Mr. Cooper - I'm sorry, I apologize, Bates.

MR. BUTLER: I won't accept your apology because I don't think there's anything wrong with Rick Cooper and, and you know it.

THE COURT: Go ahead.

MR. BOLDING: I can picture Mr. Butler making the argument to the jury there was another trial, twelve people convicted this man, same evidence --

THE COURT: He's not going to make that argument. It's an improper argument and he knows it's an improper argument.

MR. BOLDING: It's improper for him

to insert the fact that there were previous proceedings in this case.

THE COURT: I don't think so.

MR. BOLDING: Well, that's a difference in --

THE COURT: Slipped out, made maybe a little too much out of it without objection, it went a little bit too far.

MR. BOLDING: Well, I couldn't stand up and object at that time, your Honor, I really couldn't. But at any rate, this type of information does corroborate the evidence that will be brought.

THE COURT: I cannot conceive how the opinion of the Arizona Supreme Court in this case would be admissible on any basis whatsoever.

MR. BOLDING: I'll really try to do some additional work, then your Honor, to try to find some law for it. I believe it would be admissible. It's corroborative of the testimony that the jury will hear.

THE COURT: I'm afraid, and I don't know how we stop it, we're getting to the point where we're trying the County Attorney's office and the County Attorney's office, conduct, whatever it was in the last case, and I simply, I am not going to

allow it if this trial goes on and I'm very sorely tempted to grant the State's motion at this time.

MR. BOLDING: Well your Honor, that's -- I will be -- sorry if that happens and if the Court tells me now that I cannot examine any witness about that Supreme Court decision until I furnish you some law that says yes, that can come in, then I will abide by that decision, your Honor. I will be working on it and I would like to reserve my right to present that to the Court outside the hearing of the jury at at another time. I just, I believe that it is, it's credible evidence. It's, thinking, you know, off the top of my head here, it's opinion evidence from experts. It's evidence that I believe is truly corroborative of the evidence that the jury will hear and I would certainly like to reserve my right to present some, if I can find you some written law, which would allow this type of testimony, your Honor, as evidence.

I'm not being facetious, I'm not being fraudulent, I'm trying, telling the Court that I believe firmly in my

mind that it is corroborative.

THE COURT: I accept your avowal of what you have told the jury the evidence would prove.

MR. BOLDING: Yes.

THE COURT: And that as an officer of the court believe sincerely that you can prove that.

MR. BOLDING: Yes.

THE COURT: I accept that on the factual matters but somehow when we get into the area that Mr. Butler has objected to on your argument regarding misconduct of the County Attorney's office which was disapproved by the Arizona Supreme Court which resulted in a prior conviction of Mr. Washington, which resulted in his having spent four years and two days and eight hours or whatever in custody, I just can't see where that's proper.

MR. BOLDING: Does the Court feel that at this time actions on the part of representatives of a party in a criminal action which shows a malicious intent, which shows a misconduct, is not some evidence of the credibility of what was being tried, what they tried to suppress, in other words, shows a bias and motive on the part of a witness like Sergeant

Bunting, shows a bias and motive to, you know, insofar as the credibility is concerned, your Honor.

THE COURT: If you can prove that a certain witness, and let me say Sergeant Larry Bunting, just to pull a name out --

MR. BOLDING: Hypothetically.

THE COURT: Out of the air because it's been mentioned, and if you can elicit facts that he failed to bring such and so to the attention of the authorities, that might very well be admissible to test his credibility. I'm not sure but I think you're going much farther than that.

MR. BOLDING: I'm really not, your Honor. I'm showing misconduct on the part of the State of Arizona by and through its agents. I have a right in a criminal case to show that. If George had gone out and say had been on bond and say had gone out and talked to a witness and said, "Look, don't testify, I'll pay you \$500 if you won't testify." that's the first thing this man would have tried to prove, the prosecutor would have tried to prove, your Honor, and that would be admissible. This is admissible because what happened in this case was, the State of Arizona,

through its agents, Bunting, Hill, Davis, Cooper, Stevens and Rose Silver, went to a witness and said, "If you won't testify in this case truthfully and if you will bust Bolding, we will give you probation." Now, that's what I'm trying to prove, your Honor and that's what I am trying to prove, and that goes directly to the credibility of the State's witnesses, your Honor, and to the evidence itself.

THE COURT: Are you talking about direct impeachment, Sergeant Smith is on the stand, you ask him, "Did you not confront Mr. Whatever his name is in custody and ask him to --"

MR. BOLDING: Yes

THE COURT: "--to testify thus and so?"

MR. BOLDING: Yes.

THE COURT: That would be proper, wouldn't it, Mr. Butler, to impeach that witness, or would it?

MR. BUTLER: The last statement that Mr. Bolding has made are not true. Dan Sokoll testified, all the people we talked about have testified. They have denied what James Hanrahan said at this time. Judge, we've got a tape and it's

somewhere in evidence in the courthouse where James Hanrahan is telling Bunting, that Ed Bolding wants him to commit perjury. We've got that. That's got to come out if we get into that. We do that and he's a witness.

You know, another thing that just perplexes me is, we've only had, since they set a trial in September, we've only had four months to have gotten into this and had a court decide all this but here we are at the twelfth hour and Ed Bolding is saying, "I want to do all these things."

I don't think any of the things he's talked about, Judge are Material. I don't think they're proper impeachment. Larry Bunting is going to say, "I don't know what was given to Ed Bolding." He's going to say, "That's not my responsibility" and he's right, it's the County Attorney's responsibility. The County Attorney acted under law as he understood it. The Supreme Court said he made a mistake.

The Supreme Court didn't say and a jury should consider that because the Defendant obviously didn't do it. The Supreme Court said, "Give him what you didn't give him the last time." and what

the Supreme Court's decision concerned and what Judge Truman's decision concerned, was the statement of Rodriguez when he said, it was a Mexican male that committed the robbery." Which statement we know could not be the truth. And all Mr. Bolding wants to do is relitigate everything now. I'm just astounded.

MR. BOLDING: Well your Honor --

MR. BUTLER: I know that's not material to anything.

MR. BOLDING: Mr. Butler has not answered the question as to whether if George had gone, or if I had gone to a witness and said, "If you will testify in a certain way I will pay you some money or do something for you or something like that." Mr. Butler certainly agrees that that's one of the first things he would be trying to prove. That's what I will be proving here, your Honor. The train runs both ways. there are two sides to that coin and I don't see how I can be precluded now.

Again, if -- I'm willing to not mention -- not question anybody including Rick Cooper when I call him to testify about the Supreme Court decision and I'll

not even offer it into evidence. I'll not mark it and have it identified unless I can convince the Court in a hearing outside the jury that it is admissible and I'm not prepared to do that right now. I think it is, it's corroborative of that type of evidence.

Other than that I just don't see how the prosecutor's surprise and astonishment has any bearing on the situation and again I just can't answer it, the question as to why it's improper to show it when the State does it when the State does it when it's not improper to show it, when the defense does it and I just think, like as I say, the train runs in both directions, your Honor.

MR. BUTLER: Judge, may I ask Mr. Bolding a question?

THE COURT: Yes.

MR. BUTLER: Mr. Bolding, if you were to call Mr. Cooper to testify, would one of the questions that you would ask him be, "Did you supply the statement of Alonzo Rodriguez to me as defense counsel four years ago?"

MR. BOLDING: I do not know.

MR. BUTLER: Well, it seems to me

what he's leading up to. He's going to try to show misconduct on the part of the County Attorney and again, I don't see how that is at all material to the guilt or innocence of the defendant. He's got everything now that he's wanted. He's gotten more than we were required to give him and I don't think it's proper impeachment in a criminal trial where there's a new trial to show that the first time out the County Attorney's office, or the prosecutor didn't give the defense attorney something he was entitled to because all that can be introduced for is to show, look, they messed up last time and because of that you should find him not guilty.

THE COURT: I think Mr. Bolding, in essence, if what you say is correct, then the Supreme Court should have directed that the judgment of acquittal be entered in this case because the State of Arizona, through its agents, denied this man a fair trial the first time, because the other side of the coin is, his remedy is a new trial because of the misconduct, but I don't think you're entitled to prove all this misconduct if

such is the case, to impeach every witness, and I think that's what you're saying to me.

MR. BOLDING: Your Honor, it's admissible for the State as they did, trying to do with Mr. Hirsh now in another case, to say that there was, through an investigator, an investigator talked to a witness, is it impermissible for the State to try to say that the defense is guilty of misconduct and to show that in a trial? That's admissible so why isn't it admissible the other way? I really don't understand, your Honor.

THE COURT: Again, it depends on, you know, the proposition is too broad.

MR. BOLDING: Well, it is too broad but what I'm saying is, Your Honor, that I will be proving that there was a deal offered to Mr. Hanrahan to not testify and that clearly goes to the weight to be given to the evidence, your Honor, and that's exactly what they would be trying to prove if I had gone out and tried to get somebody to make a deal and I guess he's going to try to prove that I went out and tried to get Hanrahan to make some kind of deal. I don't know whether he's

going to try to do that, but that's what I will be trying to prove, your Honor, That's what I will prove, not be trying to prove. It's clear from the record, it's in the evidence. It's in previous hearings. It's clear that that's exactly what happened and Mr. Butler can't disagree with that situation, that I will be proving that. Now, whether the jury believes it is another story, but it goes directly to the weight of the evidence, the weight to be given to the evidence, your Honor.

THE COURT: The weight to be given to every bit of evidence admitted in --

MR. BOLDING: No.

THE COURT: --this trial.

MR. BOLDING: No.

THE COURT: What evidence.

MR. BOLDING: Only to the evidence to show some corroborative value for Hanrahan's testimony, No. 1, to show, to impeach by actions other State agents who might testify here including Bunting, Cooper if he's calling Cooper. It's impeachment testimony, your Honor, and I will be proving it. And you know when the defendant, if the defendant did the

same type of thing, that would be the first proof we'd be hearing from the witness stand, I promise you, and I just don't believe that I can be precluded, therefore, from offering the same type of impeachment testimony. I'm doing it in good faith and I'm doing it openly and I'm doing it in defending this man and I just, it's just proper impeachment testimony, bias, motive, to show that they're out to get George, to show the lengths that they would go to to try to get him, to show that they would try to cover up testimony. That is clearly, goes to the credibility of the witnesses to the type of weight that's given to the testimony, your Honor and I'm just again, as I say, I'm willing to tell you what the situation is and what I'm going to do and I think you will agree with me, your Honor.

MR. BUTLER: Your Honor, I don't disagree, he has a right to call James Hanrahan. He has a right to ask James Hanrahan, "Do you know anything about this case?" and Mr. Hanrahan would say,

Yes, I do and this is what I know." and he may have a right to say, "Did the prosecution or the State try to get you to lie?" and then we introduce our evidence that Bolding tried to get Hanrahan to lie, according to Hanrahan because we have a taped statement of that. And Mr. Cooper gets up and denies that he tried to get Hanrahan to lie. Then I call one of the counsel for the defendant to ask him about it. He puts his own credibility in issue. We get into that and Mr. Bolding's credibility will definitely be an issue. There's no way around it, but I can't agree that some of that is competent evidence. That's why Rick Cooper is not trying the case. That's why we oppose Mr. Bolding being reappointed because we didn't want to have this case come to trial, empanel the jury and have him pull this stunt, but our request was denied.

But then on the other hand to say that he can introduce a Supreme Court decision because it's expert evidence or expert opinion and the jury should say, "Well, for heaven sakes, if the Supreme Court said it was improper, it must be and the man must not be guilty." that's

absurd [sic] and he's saying both things and they said the remedy is a new trial. That's what he's got and they didn't say the man should be let go. That's what Mr. Bolding wants, and he wants that jury to let him go because of misconduct.

MR. BOLDING: I want the jury to come back with a not guilty because George is not guilty. It's not a stunt, your Honor. I'm within my legal rights to proceed the way I've proceeded so far. I told the jury what evidence I intend to put on and, you know, the -- Bates has told them what evidence he intends to put on. If he doesn't put on that evidence, I can't get a mistrial.

MR. BUTLER: Why not?

MR. BOLDING: In your opening statement if you say, "I intend -- I will show you A, B and C and you just show A and B, you say I can get a mistrial.

MR. BUTLER: You haven't stated, a man copped out to him about the murder, I can't prove it? You bet your life I think you can get a mistrial because I've already poisoned the minds of the jury.

MR. BOLDING: That's tremendous. If you honestly intend to put on evidence, and

I do honestly intend to put on evidence and again, I make the offer that I will show the Court how I intend to do that.

THE COURT: Motion for mistrial will be denied.

MR. BUTLER: Your Honor, is Mr. Bolding going to be able to introduce evidence as to the Supreme Court too?

THE COURT: I've made no ruling on the admissibility of any evidence Mr. Bolding has asserted he's going to offer, Mr. Butler. I am accepting his avowal that the evidence would be admissible. I'm hard put to see how some of it would be admissible and I'll rule on the offers at the time they're made.

MR. BOLDING: Well, now, I didn't avow that the Supreme Court thing would be admissible. As I say I think it would be. I'm not making avowal that it is, your Honor, I want to try before I mention it to anybody I will try to bring that to your attention.

MR. BUTLER: He's already mentioned it to the jury, that's the problem, and so what I'm going to have to end up having to do, is we're going to go through a week or so of trial he's going to come up and

he's going to try to introduce this stuff. He's not going to be able to do it. I'm going to have to get up and ask for a mistrial because they've heard it.

MR. BOLDING: You have a right to do that, Mr. Butler -- I'm sorry, your Honor, I think Mr. Butler has the right to do that. He can make the motion any time he wants to, your Honor, I just was gratuitously saying that I would present that to you. I will go ahead, then, I will try to pursue it and I will try to get it in without a previous hearing, your Honor. If the Judge tells me it's not admissible, then obviously I can't use it. I was gratuitously trying to say that I would try to present you with some law to show that that type of evidence would be admissible, your Honor.

MR. BUTLER: Judge, I'd at least request that because I don't want to go down the line and have to ask for a mistrial. I know that you don't want that to happen.

THE COURT: No, at least on that one point, already testified, I will direct you to present me with some authority that that's admissible before you offer it

before the jury.

MR. BOLDING: Or some theory or law.

THE COURT: Yes.

MR. BOLDING: O.K.

MR. BUTLER: Is Mr. Bolding agreeing, Judge, that if he is unable to introduce evidence as to the Supreme Court decision, he agrees I've got a right to a mistrial?

THE COURT: No, he's agreeing that you have a right to make a motion.

MR. BUTLER: Well, I guess I can make it whenever I want but --

THE COURT: I think if I granted you a mistrial at this time and I was not on sound ground and you have objected --

MR. BUTLER: That is something, your Honor, I'm willing to risk.

THE COURT: We'll stand at recess for about five minutes.

(RECESS)

(Proceedings resumed before the jury not transcribed.)

(EVENING RECESS)

X. Mr. Butler's Renewed Motion for
Mistrial and Argument Therefore
On the morning of January 10, 1975.

[Pages 133 - 147]

(Following proceedings had out of the presence of the jury):

THE COURT: Mr. Butler, you indicated you had motions to make outside the presence of the jury?

MR. BUTLER: Yes, your Honor. Thank you. My motion is for a mistrial. I don't know, your Honor, if it's properly for reconsideration of the one I made yesterday or it's new. I think it's probably a little of both but I want to refer the Court to Rule 314 of the old rules of criminal procedure. I have a copy of that rule if the Court wishes to see it and I have a copy of some other things I'll be citing.

The particular language I'm talking about, your Honor, states that when a new trial is granted, the new trial shall proceed in all respects as if no former trial has been had, and the last sentence, former verdict or findings shall not be

used or referred to in evidence or argument on a new trial.

In Amjur they talked about, 58 Amjur 2d, 228, talk about any reference at a new trial, the result of a former trial or the same cause is improper. It should be at 58 Amjur 2d, 228 and the rule is 314. The Amjur citation goes on to indicate that the jury who are empanelled at the new trial must act upon their own responsibility and according to their own review of the testimony which is submitted to them entirely uninfluenced by the action of any of the jury.

Your Honor, I think that the rule 314 is mandatory, it says the former verdict and findings shall not be used. It doesn't say a defendant may waive that. I think what we have, your Honor, is a situation where, after the conviction of the defendant in this case, he has an excellent appeal point in that the jury was improperly influenced because they were told of the former conviction and, which I think defense attorney can argue on appeal, Mr. Bolding should not have done and it caused the defendant to not receive a fair trial.

I would also like to cite to the Court case of State versus Kinzie which is a Washington State case, 1972, again holds that the retrial of an action proceed de novo and places parties in the same position as if there had been no trial in the first instance. That case, your Honor, cites the case of State versus Young which is found at 200 Kansas 20, also at 437 Pac 2d 820 where the Supreme Court of the State of Kansas indicated that where defendant files a motion for a new trial and the same is granted by the district court, or as here by direction of this court upon appellate review, the State and the defendant are placed in the same position as if no trial had been had. At the new trial all of the testimony must be produced anew and the new trial must stand or fall on its own merits. Any reference, your Honor to the old trial is improper according to that case also.

Now, your Honor, the research that I did last night on this issue, the only case that seems to be directly -- I don't know if I can show it's directly on point but it's the closest thing that I could find in an extensive review of the law,

is a case called Smith Versus Smith which is cited at 176 Southwest 2d 647. It's a Missouri appeal case, and that case found that where a motion for a new trial is sustained, it thereupon becomes the duty of the court to proceed as in the first instant with no advantage to be taken of the former decision or the action of the court in granting a new trial, and it's the position of the State, your Honor, that Mr. Bolding's reference to a Supreme Court opinion in which he indicated that the Supreme Court found misconduct on the part of the County Attorney because of an alleged suppression of evidence and, therefore, a new trial was granted, Mr. Bolding is attempting to utilize the action of the Court in granting the new trial for his benefit, and I think the Court, at least I intended to, give the Court a copy of that Smith v. Smith case, a 1944 case, your Honor.

There's a case, your Honor, of Olds, I think it is, Your Honor, and I can't determine, that's the last -- that's the defendant's name, I can't remember the first because it's not xeroxed but it's found at 120 Northwest 2d 469. That

case, your Honor, refers back to the CJS citation at 226 for the proposition that a new trial is a trial de novo as if there had been no previous trial and that the case used to be conducted on the basis of what is presented at this trial with no hearing to be had what happened in the past.

Now, in the case of Leaventhal Versus Baumgardner at 209 Georgia 404 indicates that where a new trial has been granted, the case stands ready for trial as if there had been no trial. The effect of the grant of a new trial by this Court is to require the case to be heard de novo unless specific direction be given in regard thereto.

Your Honor, I do not believe we have any specific direction being given in regard thereto and if the Supreme Court would have said this opinion can be used in the evidence to indicate there was misconduct on the part of the County Attorney, I think they would have done that. That's not the law.

Your Honor, it's difficult to find cases -- I dare say it's impossible to find cases where courts have considered whether

or not an appellate decision could be used as fact. The CJS and Amjur citations, the one I'm referring to now is CJS, 21 CJS at paragraph 122 which deals with the operation of in effect judicial opinions, indicates that an opinion by a court or Judge is merely evidence of the law and is not the law. It is not part of the record.

Mr. Bolding would have this opinion used as part of the record and he would have it used as more than law. He would have it used as fact and that is totally improper.

Fortunately I was able to have some assistance in my research last night. Three other attorneys and none of us were able to find this elusive case that Mr. Bolding refers to that he said he would produce for the court indicating that in such a situation as we have here it would be proper to use the Supreme Court decision in the manner that he wished.

Also, your Honor, I'd like to remind the Court that under the rules of the Supreme Court of the State of Arizona, memorandum decisions shall not be regarded as pertinent or cited in any

court except for the purpose of establishing a defense of res judicata, collateral estoppel or the rules of law -- excuse me, or the law of the case, and that's rule 48, paragraph C.

We have a memorandum decision from the Supreme Court in this case. Judge Truman simply found in her ruling that the defendant had been denied due process. The Supreme Court affirmed her decision and they wrote a memorandum opinion. According to the rules the Supreme Court memorandum decision shall not be regarded as pertinent or cited in any court except for the times that I've indicated.

Now, your Honor, it seems to me that what we have here is a situation where, first of all, if this Court does not require Mr. Bolding to at this time indicate in what manner that he will introduce the Supreme Court decision, what we have -- what will result is after about eight days of testimony, the Court will be even more reluctant to grant a mistrial if Mr. Bolding is unable to do it. I know I would be more reluctant to do that because we'll have eight days of testimony in.

I think now is the time the decision should be made as to whether or not Mr. Bolding has the right to introduce evidence of the Supreme Court decision in granting or affirming the lower court's decision in granting a new trial. It's the opinion of the State that no curative instruction given by the Court could in this case adequately cure the damage that has been done by Mr. Bolding.

The State, the position of the State has been so prejudiced by his illegal and improper argument that the State feels that it is necessary to have a mistrial granted now. I think, your Honor, that what Mr. Bolding is saying, he is analogizing, or he's trying to analogize the law that says if I had evidence in this case, that Mr. Washington tried to suppress evidence, suborn perjury, do anything like this, all of these things are evidence of consciousness of guilt and I would be able to introduce those. That's what the law says.

If Mr. Bolding had evidence that the State or its agents tried to obstruct justice, tried to suppress evidence through the individuals that have first-hand

knowledge of that, they could impeach the witness, perhaps. If he can prove that Larry Bunting tried to get a witness to lie that perhaps is material to Bunting's testimony depending on what Bunting's testimony is, but what happened four years ago and to be able to say that he is allowed to relitigate what was heard at the motion for a new trial and had this jury hear that allegations were made, that the State tried to suppress evidence which in turn allows the State to show Mr. Bolding tried to suborn perjury and then to throw into that mish mash the opinion of the Court, I think would be totally improper.

That judicial opinion of Judge Truman and of the Supreme Court has absolutely nothing whatsoever to do with the guilt or innocence of George Washington which is the only issue we are to be trying in this case.

Now, I know the Court is familiar with the case law that indicates that prior bad acts of a defendant are inadmissible in a trial against him except under certain limited circumstances, and in trying to analyze the situation we have here, it seems to me that the same

philosophy should apply. If the State is guilty of prior bad acts, they should not be admissible unless they are relevant to the guilt or innocence of the defendant.

And Your Honor, I don't know if -- throughout the whole trial, I guess Mr. Bolding seems to think this is a big joke. I don't consider it that way.

MR. BOLDING: I apologize, your Honor.

THE COURT: O.K.

MR. BUTLER: I think what we've seen here, your Honor, is continual conduct on the part of Mr. Bolding that he has apologized for, objections have been made and sustained and Mr. Bolding has told us that he will not do them again. I'm afraid the entire trial is going to be conducted that way.

Your Honor, if the Court rules in a criminal case that a statement of a defendant is voluntary, it may be submitted to the jury. That jury is not entitled to consider that ruling as factual evidence of the voluntariness of that statement. I would not be allowed to say: "Ladies and gentlemen" -- and we have a voluntariness issue in this case which Judge Truman ruled on in the last case.

She said the statements of the defendant were admissible. I would not be allowed to say: "Well, look, ladies and gentlemen, Judge Truman says that was admissible. Obviously, you should be able to consider that in deciding whether or not that statement was voluntarily made." That's just not the law but that's what Mr. Bolding wants to do here. That's how he wants to use the Supreme Court memorandum opinion.

If the Court rules, your Honor, that a witness may identify the defendant as the perpetrator of a crime, a jury is not entitled to consider that ruling as evidence of whether or not that witness properly identifies the defendant. I'm not allowed to say, "Well look, Judge Buchanan, allow Alonzo Rodriguez to testify." We had a hearing on that, so obviously what he's saying himself, I'm not allowed to say that. But that's how Mr. Bolding is attempting to use the Supreme Court opinion.

I think, your Honor, that the proper law is cited in Smith v. Smith and that is that where a motion for a new trial is sustained, it therefore

becomes the duty of the Court to proceed as in the first instance with no advantage to be taken of the former decision or the action of the Court in granting a new trial. I cited that case previously.

Again, your Honor, assume that for the sake of argument, that Mr. Bolding would be allowed to show that the State tried to suppress evidence or that the State -- they're not allowed to show that the State did try to suppress evidence. McCormick and Udall both indicate that this presumption of an adverse nature of evidence not produced applies to evidence willfully suppressed rather than evidence not produced in court, and I'd like to cite to the Court the case of People versus Washington, 113 Cal ap 352, also found at 298 Pac 121 and People v. Lopez, found at 336 Fec 2d 614.

At the motion for a dismissal Mr. Bolding alleged that the State was -- had willfully suppressed evidence in this case. He said that's what Mr. Cooper had done. He cited a case for the proposition that in such a case where there is willful suppression of evidence by the State, and the way I remember it the case is and it

causes, or if there's any other act like that, it causes a mistrial, in the first trial, that you can't try him again at all. He asked the Court to take that ruling and find that it should apply for a motion to dismiss after a new trial had been granted. In other words, he asked Judge Truman to find that we had willfully suppressed the evidence and because it was willful, the case should be dismissed. She did not dismiss the case. She said his remedy was a new trial and I would submit, your Honor, that the only logical inference from her decision is that if there was a suppression of evidence, it was a negligent one and those two cases that I cited, the people versus Washington and people versus Lopez, all indicate that it's only where there's a willful suppression that you can even have an adverse, or presumption of adverse nature of evidence not produced.

McCormick at section 273 page 660 to 661 indicates that before you can have that adverse presumption, circumstances of the act must manifest bad faith, mere negligence is not enough for it does not sustain the inference of

consciousness of a weak case.

And that, your Honor, there's always, those citations deal with admission by conduct. I was unable to find any case where they said those philosophies applied against the prosecution. All of the cases that are cited apply in -- against a defendant or apply in a civil case. I do not believe Mr. Bolding can show this court one case where a defendant was allowed to introduce evidence of attempt by a prosecutor to willfully suppress that evidence and where a Court would have ruled on that, it's not there, Judge.

If he can show, I think he can show that -- if I hide a witness today, I think he can show that. I don't think he can show what happened four years ago because he's got all the information now. The Supreme Court says that's his remedy, give it to him, he's got it. And what he is trying to do is ignore the State of Arizona in Rule 314. They said the former verdict or finding shall not be used or referred to in evidence or argument on the new trial.

Now, I assume that Mr. Bolding is going to say, "Mr. Butler opened the doors because of a statement" -- my statement

about prior proceedings.

Mr. Bolding told this Court that he intended to put in evidence of Luke Murray. Mr. Bolding has indicated to this Court that Mr. Murray is dead. The only way he can put that in is to use testimony at the prior proceedings -- excuse me, at the prior trial. In that testimony at the prior trial there was reference to Mr. Murray's testimony at the preliminary hearing. I knew that when I made my opening statement. The Court knew that. I properly called the instance when Mr. Murray testified previously, a prior proceeding. I did not call it a trial. For me to call it a trial would have been improper. Mr. Bolding decided to go further and call it a trial. Then he decides to tell the jury about the conviction. And I would submit, your Honor, Mr. Bolding has gone so far in his argument that he has opened the door at this stage of the proceedings for me to talk about the fact that Mr. Washington was found guilty the last time by twelve people just like those people that are in the box because that's what he said. He, apparently, is going to imply that he was found guilty because

we didn't give him all the evidence. That to me indicates, look, ladies and gentlemen, even with that evidence that jury four years ago would have still found the same verdict.

I think that because of Mr. Bolding's argument the case has gotten completely out of hand. I would suggest to the Court, your Honor, a mistrial is a manifest necessity at this time because of the conduct of Mr. Bolding and I would request that my mistrial motion be granted.

THE COURT: Thank you. Mr. Bolding.

XI. Mr. Bolding's Response to Mr.
Butler's Motion for Mistrial
on January 10, 1975.

[Pages 147 - 152]

MR. BOLDING: I don't think I'm prepared to argue at this time, your Honor. I'll argue it if the Court wants me to but I don't think I'm prepared to at this time since I did not have four attorneys working on this matter last night and I just -- I thought that finally the County Attorney would abide a ruling of the Court and not continue to bring them back up but evidently in the future I should remember that that's not going to happen.

All I can say, your Honor, is to reiterate most of what I stated yesterday to the Court. One of my most learned friends in the law in this area tells me that what I should do this morning is to, or told me what I should have done yesterday was to just state, "Well, I object to a mistrial" and then let the Court grant the mistrial because it would clearly be that jeopardy has attached, and so I probably ought not to care one way or

another.

I want to clear up a few things that the prosecutor talks about that are clearly not applicable here. I assume that Smith v Smith is a civil case, I'm not sure of that but I assume that, it sounds like it is.

No. 2, an illusive case that he's talking about, Mr. Butler evidently didn't hear what I was saying yesterday because I was talking to the Court about the plea of once in jeopardy when I told the Court I will produce a case, and I will produce that case for the Court, to show that it is a jury question, on the once in jeopardy theory. I did not ever tell this Court or will the Court this morning that I can produce a case saying that the memorandum decision of the Supreme Court is admissible into evidence. I did tell the Court yesterday that before I questioned any witness about it, I will, and I think the Court instructed me to bring that to the Court's attention outside the hearing of the jury which I still will do. I have not worked on that because I'm not at that stage yet where I think it's necessary to bring that into evidence. That will be brought into evidence only upon

the testimony of Mr. Cooper, Mr. Stevens, Mr. Dingeldine, Mrs. Silver, if those people are called as witnesses. -

This is a substantive defense of the defendant in this particular case. These rules were passed, were in force, the cases are all raised by the defendant, they are in force as protective of the defendant, your Honor. It is grounds for a mistrial if the prosecutor stands up and says: "This man has been previously convicted of some-- of this crime for which he's charged."

That's grounds for mistrial on request of the defendant, probably grounds for mistrial if the prosecutor refers to prior proceedings in this case which he did. I did not make a motion for mistrial at that time.

The proper way to introduce prior testimony is to say: "Mr. Smith, you have given prior testimony -- you have given prior sworn testimony that was reduced to writing, is that correct, you did that on December 13, 1970" whatever the date is. You don't, and the prosecutor doesn't and cannot refer to other proceedings. It's grounds for mistrial when a prosecutor refers to preliminary hearing which he

did in his opening, which he did with Mr. Choat. It's grounds for a mistrial on application of the defendant when the prosecutor talks about prior proceedings, a preliminary hearing, because obviously the man was held to answer, obviously the man was convicted at a previous trial four years ago, a previous proceedings, the prosecutor says, "Four years ago."

Now, you know, the juries are not dummies. They certainly can't leave their common sense at home and know that he's referring to a prior trial. I did not make the motion for mistrial. I perhaps should have done so at that time because I'm not happy with the jury and I would certainly, if Mr. Butler, if at that time I would have made the motion for mistrial, I probably could have had the thing granted and then we'd be back starting again.

This is a -- well, so as a consequence of that, I may have waived my appellate point. I may have waived an appellate point about the prosecutor talking about the prior proceedings. At any rate I certainly, the only appellate point that I might have would be Mr. Butler's opening statement where he

referred to four years ago and prior proceedings had in this case, which he's not allowed to do. I would have that, I think I would preserve that appellate point although I did not object to it at that point. I think that's fundamental and I don't believe I can waive that.

Anything that I have done and I don't see how I can complain about, if there was an error which I certainly do not agree, took place but if there was one and I think that's called something like the doctrine of created error and I am not certainly entitled to benefit if I insert error into the case. Neither is the prosecutor entitled to benefit if he inserts error into the case. This goes clearly, your Honor, to a substantive defense of Mr. Washington, this goes clearly to an abuse of power to show the reasons for the charge being filed against Washington and the resultant action after the filing of the charge to show that they were correct in filing the charge. It results in improper conduct on the part of the prosecutor, not Mr. Butler, and on the part of several of the prosecutors.

The fact that they would suborn perjury, the fact that they would wire a

witness to try to see if someone suborning perjury and to try to set me up to the fact that prosecutors would go as far as they did and promise one of the witnesses probation if he would not testify in this particular case, which will be proved.

All of that certainly, your Honor, goes directly to our substantive defense, to the reasons for being here today.

Again, I haven't had the opportunity of having any lawyers working on this matter. I think the Court would be, if the County Attorney is advising the Court to grant a mistrial, I think that advice is ill conceived at best and advice that's given only for the purpose of knowing that the case is going at this particular point a little bit against the County Attorney, so they call out the troupes [sic] of four or more lawyers and try to find some way to get out of the mess that they're in at this time by trying to get the Court to grant a mistrial, and for that reason and for all those reasons, I would again ask for a little bit of time to get some legal matters together if necessary, but if the Court feels it's necessary, but I do ob-

ject to the granting of the mistrial at this stage.

THE COURT: The only authority I'm concerned with that was cited to me, Mr. Bolding, is rule 314 of the old Rules of Criminal Procedure and I find that rather definite in statement.

MR. BOLDING: Do you have annotations.

THE COURT: Are there any cases cited under that rule, Mr. Butler.

MR. BUTLER: They all talk, I believe, your Honor about double jeopardy. I didn't look at the annotations, someone else did. That's the way I remember being told that.

THE COURT: There's an old criminal rule volume in chambers, Andy.

XII. Colloquy Between Judge Buchanan, Mr. Butler, Mr. Bolding, and Mr. McDonald Regarding Mr. Butler's Motion for Mistrial on January 10, 1975.

[Pages 152 - 160]

MR. McDONALD: Your Honor, just one thing, rule 314 -- well, perhaps the Court would like to get it here.

THE COURT: Go ahead.

MR. McDONALD: 314 in the argument Mr. Butler raises on its face seems to have some soundness to it, but it's clear that the purpose and the manifest purpose of 314 is to keep the prosecutor from standing up and saying: "Twelve men convicted this man before, how in the world can you let him go." It's a defense protective, as Mr. Bolding says, if there had been any error which I do not think there has been, he does not think there has been but if there has been any error whatsoever, it's clear that the doctrine of created error would control and we've maybe waived that point, appellate proceeding, but it's inconceivable that, at least it's incon-

ceivable to me the County Attorney can come in and argue that four years ago the fact that the defendant, the material witness was suppressed, the fact that the County Attorney attempted to wire an individual, all that parade of horrors, it's inconceivable to me that the County Attorney can say, "That can't get to the jury. The jury cannot know about that." It's just the most absurd thing I ever heard.

THE COURT: Mr. Butler, do you want to respond?

MR. BUTLER: Your Honor, I'm not sure how familiar this Court is with this business about wiring a witness. I assume this Court knows that when this witness was wired, he was wired after the County Attorney's office checked with the Presiding Judge and checked also with another Judge of the Superior Court and that procedure was undertaken with their approval. Assume that we get into that.

Mr. Bolding told Judge Richey, it's my understanding it was Judge Richey and it may have been Judge Truman, but it was on October, I believe it was October the 24th of this last year when Mr. Bolding was appointed. There was a motion

anyway about who was going to defend George Washington. Randy Stevens represented the State -- Jim Howard represented the State, excuse me. It's my understanding at that proceeding Mr. Bolding told the Court he had no intention, at least no intention at that time of calling James Hanrahan. Apparently, Mr. Bolding knew at that time that the reason he wouldn't be calling this man was if he called him, he could not --

MR. BOLDING: Your Honor --

MR. BUTLER: -- be an attorney.

MR. BOLDING: No, no.

THE COURT: Proceed.

MR. BUTLER: He could not be an attorney representing the defendant. That was our objection then. This man should not represent Mr. Washington because he is a potential witness. That's why Mr. Cooper is not. Mr. Bolding gets up and says, "I have no intention at least this time of calling Mr. Hanrahan." Mr. Bolding was appointed. He told the Court yesterday he tried to subpoena Mr. Hanrahan.

I assume, therefore, he's prepared to withdraw himself from the case if that's his present posture.

It seems that it's all right, Mr. Bolding and Mr. McDonald think for a defense attorney to mention the former verdict but it would be impossible for the State to. I certainly don't understand that the way that the rules of evidence operate.

They characterize rule 314 as a defense protective rule. I assume what they're saying is that that rule does not also grant the State a right to a fair trial because if you assume that it goes only one way, that's the logical conclusion of that.

Your Honor, I think that this court should be concerned with the opinions stated in Smith v. Smith where it says that the former verdict or former decision, opinion used in which they granted a new trial should not be considered by the jury in the new case.

The State, your Honor, in this case has attempted to bring to the Court for its consideration legal authority. Mr. Bolding keeps telling us, "Later, Judge, later, I'll have it later." The time to make the decision on this admissibility of the Supreme Court opinion is now. He's already

told the Court, the jury, your Honor, that the reason a case is retried was because the Supreme Court found that the County Attorney's office willfully withheld evidence from the defendant, and submit that that statement of Mr. Bolding cannot be cured, that the proper law is, that no reference to what happened at the last trial should be used and certainly that no attorney should be permitted to tell that jury what a legal ruling was, the effect of that ruling, and then ask that jury to consider that ruling on the question of guilt or innocence. That's what Mr. Bolding wants that jury to do.

The only cure, your Honor, is a mistrial. The State is well aware that if the position I'm taking is wrong, if a mistrial is not proper, that man walks, I know that.

THE COURT: And I expressed my concern about that, Mr. Butler.

MR. BUTLER: I know that, your Honor. It's not something, it's not a statement that I make lightly. I am convinced, your Honor, though that because of the improper and illegal argument of Mr. Bolding in his opening statement, that manifest necessity indicates we've got to have a mistrial. He caused it. I don't think there's any way

you can tell that jury now, "I don't want you to remember what Mr. Bolding told you about the Supreme Court granting a mistrial because of misconduct on the part of the County Attorney" and I think, your Honor, that the only decision is to have a mistrial granted now and the decision, now, I think should be made now, today as far as that evidence of the grand jury -- or excuse me, evidence of the Supreme Court opinion. We can't wait five days, six days, eight days down the line.

THE COURT: Have you considered the effect that I think, my recollection is that you failed to object for the record in point of time to that particular statement on the merits --

MR. BOLDING: He did.

THE COURT --of a review of the granting of the motion for mistrial.

MR. BUTLER: Yes, your Honor, I have.

THE COURT: Mr. Bolding?

MR. BOLDING: Yes, Your Honor. I've got to respond because what Mr. Butler put into the record, which might or might not be a personal matter but I've got to respond to clear the record on that. This wiring of the witness was not done with any

approval of the presiding Judge of this County, any other County or any Superior Court. The County Attorney went to the Judge and explained a situation to him, did not tell this Judge that Hanrahan had said, "I saw it and it was not Washington." Did not say that, so the Judge responded four things, Judge Richard Royston responded four things: No. 1, I will not grant any certificate or any warrant or anything to you to do this wiring.

No. 2, I don't know of any law that would prohibit you doing this.

No. 3, you will find out that Bolding did not do anything improper, and

No. 4, if you want to do it, that's your problem. Go ahead and do it.

Now, that's the authority that the County Attorney operated under, that they keep referring to and keep going to the news media about some big authority from the presiding Judge. There was no authority and Richard Royston will tell you that.

Now, No. 2, he did not object at any time to that portion of my opening statement.

No. 3, I have not told this Court that I can positively furnish you with a

case which will let me get that in. I think I will be able to give you some law to show that I can get that in. I still think I can.

No. 4, your Honor, is rule 314 and I haven't even looked at it, haven't annotated it, haven't done anything in that respect, but my guess is that that rule has been interpreted only against the State. How could the introduction of evidence that twelve people found a man guilty before, how in anybody's sense of the word or anybody's imagination or Mr. Butler's imagination, how could that help the defendant? It cannot.

I didn't go into this matter, the prosecutor went into the matter initially. I think that the Court would be wrong in granting a mistrial and I think we ought to get on with it unless we're going to have a motion for the mistrial on the same basis every morning until 10:20. I just think it's wrong. Mr. Butler is scrambling. He knows the case is going against him and he wants out of it, and I would ask for time to check into rule 314.

THE COURT: give you fifteen minutes.
(RECESS)

XIII. Mr. Bolding's and Mr. McDonald's
Final Arguments Opposing Mistrial
Declaration.

[Pagds 160-169]

THE COURT: Mr. Bolding, you have some additional authority.

MR. BOLDING: Your Honor, yes, and for the record, I do want to state this also. The Court granted me, just so that the record is clear, on yesterday as the Court remembers, the prosecutor filed his motion for mistrial. The matter was completely heard by the Court and, apparently, decided at that time by the Court adverse to the County Attorney. I had no opportunity, took no opportunity over the evening recess to search that area at all because I felt that the Court was right in his ruling and spent no time on it. The prosecutor spent time with three other attorneys and I don't know how many law clerks in trying to find some area so that he could get a mistrial because he cannot stand up here and tell you anything except that he feels that the jury, if this case goes on to it's completion, will come back with a not guilty.

Now then, after the motion for mis-

trial -- before mistrial was reurged this morning, I had not time to research and the Court granted me 15 minutes. I've taken 20, 25 or 30 minutes and still, have utilized the services of one or two other attorneys in about a 15-minute period here to try to find something to show to this Court, to show that this Court is incorrect if the Court is considering granting a mistrial. I want it clearly on the record that we are objecting to the mistrial and that we feel that the posture of the case is such that there will be a not guilty finding and that we feel that's the entire reason for the motion by the County Attorney.

Secondly, we want it on the record clearly that the County Attorney at no time during my opening statement made any objection to any mention I made of any finding by the Supreme Court of the State of Arizona in regard to a retrial of this matter because of the prosecution's misconduct and because of the suppression and the withholding of evidence by the prosecution. There was absolutely no -- no objection. There was no request by the prosecutor to have the jury disregard such remarks. There

was nothing, complete silence by the prosecutor. Later a motion for a mistrial was made after the completion of the opening statements and after an hour and a half recess for lunch. Finally the prosecutor then made his motion for a mistrial.

Thirdly, we would point out to the Court the case of State versus Sianez, S-i-a-n-e-z, 447 Pac 2d 874, 103 Arizona 616. In that case, your Honor, testimony was introduced by the prosecutor relating to records kept in the State Prison. I'm sorry, 103 Arizona 616 in which the prosecutor introduced testimony relating to records kept in the State prison. This was introduced for a purpose of identifying the defendant's handwriting and allegedly implying that the defendant had been an inmate in the State prison. This was not grounds for mistrial where the testimony was later stricken from the record and the jury was admonished to disregard it. That was on defendant's motion for mistrial.

The case of State versus Downey, 453 Pac 2d 521, 104 Arizona 375, was a case in which defense counsel on cross examination had referred to a prior proceeding,

the admission referred to a "prior proceeding." The admission of testimony alluding to a previous trial in which the defendant gave a false name was not so prejudicial as to require trial court to grant the defendant's motion for mistrial.

Two cases which are clearly in point which I bring to the Court's attention because I feel that if the Court does grant the motion for mistrial and again my more experienced and learned brethren in criminal law feel, would say that I'm a fool for standing here and I'm not representing George accurately and adequately by objecting to this mistrial because jeopardy has attached by the empanelling of the jury, according to all the cases, and the granting of a mistrial would preclude any further action in this particular case.

I know the Court is aware of the constitutional provision, article 2, section 10 which provides that no defendant shall be twice placed in jeopardy on the same offense and all of the cases under such provision which call for an erroneous granting of a mistrial as being once in jeopardy by -- as the defendant being placed

once in jeopardy.

I would point out to the Court the similarity between the words in case of State v. Downey and the words that the prosecutor used in his opening statement wherein he referred to two, not one, but two previous proceedings, two prior proceedings, and would submit to the Court that any implication received by the jury by those remarks would be that there were previous proceedings and what are previous proceedings, and that is a trial. And the Court, of course, in the case of State v. Downey referred to "Prior proceeding" the admission where defense counsel in cross examination had referred to prior proceedings, the admission of testimony alluding to the previous trial was not such as to grant a mistrial.

The allegedly implying the defendant had been an inmate in the State prison evidently on that or another particular action, that was ordered stricken from the record and the jury admonished to disregard it.

Mr. Butler made no motion to have the jury disregard this. This is primary, according to the defense, according to what

the Supreme Court has told the defense in all cases, you must make an objection. If your objection is overruled, you must make the motion to have the jury disregard the erroneous matter which might have been inserted, or you waive your claim, you waive your right, and we say that Mr. Butler's opening the door by alluding to prior proceedings totally allows us to go into this situation. If not -- if it was error, if I said something that shouldn't have been said, then he should have objected. If that objection was overruled, he should have asked that the jury be instructed to disregard, if the objection was granted, he should ask that the Jury be instructed to disregard it. He didn't do those. His inaction now has called for him, because of the posture of the case and the fact that the witnesses are now totally evidently against the prosecutor in the case, makes him want a mistrial.

He knows that I have a remedy on appeal and this is the prosecutor's great right. You have a remedy on appeal and this is the Supreme Court of Arizona, at great length, you have a remedy on appeal. Sure,

we go through, we pick another jury, we go through another trial and three years from now, four years from now if there's any basis, if we can say that history gives us any basis to predict the future, four years from now we'll be back here with another trial and George Washington, Jr., will have been incarcerated, in custody for an additional four years.

Now, if the prosecutor insists on his motion for mistrial and if the Court in light of all the cases and in light of the jeopardy issue decides to grant the motion for mistrial, we'll be asking that Mr. Washington be released from custody because he simply cannot be held again for another four years while the prosecutor gives us our great remedy of appeal, and we feel that the Court should look at the practicalities of the situation, should know, based on the Court's experience and the Court's feelings and based on the fact that prosecutors rarely, no cases, no cases except the State v Ballinger case that I've been able to find where the prosecutor caused a mistrial -- prosecutors rarely ask for a mistrial. This is the first mistrial that I've ever had a prosecutor ask for in fifteen years, rarely

ask for a mistrial.

Why do they ask for a mistrial? Only if they see the case going down hill and that's the exact reason for this. We feel that the additional matters that have been presented preclude totally this Court from granting a mistrial. It would be error for this Court to grant a mistrial. It would cause the defendant much grief and problems in the future in regard to remaining in custody if the Court orders him to remain in custody pending any further action, and for those reasons and the additional reason Mr. McDonald has covered in one area, and I'd like for him to argue, we ask the Court deny the motion for mistrial, your Honor.

MR. McDONALD: I'll be very brief, your Honor. I just want to add one thing and that is, the Court's presented with a difficult problem no doubt but in looking at what was said and looking at this jury and looking at the State, given the discretionary nature in this trial it just seems inconceivable to me that this jury is so prejudiced at this time that they cannot give a fair trial to the State. Mr. Butler has admitted that with Mr. Bunting and other witnesses and the testi-

mony of some witnesses he doesn't think will be here, that the matters that were mentioned are going to come out as impeachment material anyway, so I'm just asking the Court to look at the practical effect of what has been done and to make that judgment on the basis of the fact whether or not the State can proceed with a fair trial.

I don't think this jury is inflamed or impassioned at the State. I think there's material the State doesn't want them to know about but it's clearly discretionary and if there is error, it seems to me that it's not the kind of error that has created a jury atmosphere that cannot render the State a fair trial, give them the remedies which should be approached before mistrial such as cautionary instructions, things of that nature.

That's all I would have to add to what's been said.

MR. BOLDING: And further, your Honor, in that regard and in regard to rule 314, we would bring again the Court's attention to the fact that 314 is protective in nature for the defendant. All cases under that rule discussed double jeopardy and discuss

whether the defendant was placed in jeopardy by the mentioning by the State of some prior proceeding. It's protective for the defendant, your Honor. The State cannot be placed twice in jeopardy. What's the reason for that rule? The reason is so that the defendant will receive a fair trial, and under 314, under rule 314, I could have been granted and I requested it, perhaps a motion for mistrial at the time Mr. Butler talks about prior proceedings. Probably I should have asked for a mistrial at that time and probably then at that time it would have had to be granted and the defendant would have been placed twice in jeopardy. I did not ask for a mistrial at that time. Mr. Butler opened the door.

If I'm wrong--if I'm wrong in my analysis of 314 as being protective for the defendant only, as being protective for his right to a fair trial, as being protective for his rights so that a jury would not know there was a prior proceeding at which time he was found guilty. If I'm wrong then I ask the Court to instruct and admonish the jury that they will disregard statements that I made in regard to the prior -- a hearing by the Supreme Court or

a decision by the Supreme Court--if I'm wrong. I was unaware of 314 at the time, I mean unaware in the specific sense, your Honor. I'm aware of the rules in general. I was not aware specifically of 314 at the time any mention was made. Had I been aware of it, I think that I'm still correct in that it is protective of the defendant and was a rule that was put in force for his benefit, for the defendants generally, their benefit, and we fail to see how that gives the Court the right to grant a mistrial in this area and subject this man to another four years of incarceration just based upon the fact that it's, the prosecutor's case is not what he thought it should be.

XIV. Mr. Butler's Final Argument For
Mistrial and Judge Buchanan's
Mistrial Declaration.

[Pages 170-176]

MR. BUTLER: Your Honor, the reason the prosecutor's case is not what he thought it should be is because of the improper, illegal and unethical argument of defense counsel in his opening statement and because of that argument, that no instruction, had it been given immediately following the improper conduct, argument of defense counsel, no argument or instruction then and no instruction now can cure the prejudice that has been given. I assume, your Honor, that all the rules of criminal procedure, including rule 314, are designed to protect and ensure a fair trial for both sides. Mr. Bolding would have this Court find otherwise. He tells this Court about the Sianez case, records kept in the State prison and there a mistrial shouldn't have been granted. I think it's one thing to have that kind of evidence in front of a jury and have them told to disregard it. I think it's an

entirely different thing to have this jury told by the defense attorney that the highest court in the State of Arizona has considered this case and the highest court in the State of Arizona has said the State of Arizona through the County Attorney was guilty of misconduct.

MR. BOLDING: Your Honor, that's a misstatement. I did not say that.

THE COURT: I recall what the--

MR. BUTLER: Your Honor, I think my comments are the direct inference that can be drawn from what Mr. Bolding said in his argument. He stated that the Supreme Court overruled, that granted a new trial because the County Attorney or the prosecutor I think he said, willfully withheld evidence, suppressed, hid evidence. That's what he said. I think this jury cannot fairly sit and decide this case knowing that and I don't think any instruction is going to cure that.

This business about the prior proceeding, Mr. Bolding now says he didn't ask for a mistrial. Well, as a matter of fact he did. He asked for a mistrial because of those comments of mine and the Court denied that. I do not believe that

my comments on there being a prior proceeding implied that this defendant was present at this prior proceeding, at least that one of those prior proceedings was a trial or any other was. The Jury knows and knew at the time I made those statements that this defendant has a co-defendant, Mr. Rodriguez. They could have equally felt that those comments of mine applied to him.

Your Honor, we have, I think, a situation where, because of the improper argument, the State cannot obtain a fair trial. I'm aware of the Burrell case. I'm aware that whether the granting of mistrial is discretionary. And I'm aware that if the decision of the Court is to grant a mistrial and that's wrong, Mr. Washington has been placed in jeopardy, and I submit, your Honor, that's exactly what Mr. Bolding was aware of when he made that argument in his opening statement. That's the first time we were told either in court or in the Judge's chambers off the record that he intended to tell this jury about that Supreme Court decision. He knew at that time he could not get that decision in, what that opinion is. He knew at that time.

MR. BOLDING: Your Honor, that's a lie. I'll say that in open court.

THE COURT: I understand your position.

MR. BOLDING: Thank you, your Honor.

MR. BUTLER: Then it's my position if he did not know, that he should have known for someone that's practicing law as long as Mr. Bolding has. He made those statements, they heard it and he knew they'd hear it.

Your Honor, I think that the motion for mistrial should be granted. I do not ask for the mistrial lightly. I know the consequences of my request and I do not ask because I fear anything other than the fact that this man right here has so prejudiced that jury that they will not be able to do what they are supposed to do, and that is give a fair trial to both sides.

THE COURT: I'm ready to rule.

MR. BOLDING: I have these cases if the Court wants them.

THE COURT: Go ahead

MR. BOLDING: No, I was just going to submit them to the Court.

THE COURT: Based upon defense counsel's remarks in his opening statement

concerning the Arizona Supreme Court opinion and its effect for the reasons for the new trial, the motion for mistrial will be granted.

It will be ordered setting this case for retrial on Tuesday, January 14th, 1975, commencing at 9:30 o'clock a.m.

Is there anything further.

MR. BUTLER: I have nothing further, your Honor.

THE COURT: Mr. Bolding.

MR. BOLDING: Thank you, your Honor.

THE COURT: Call the jury in, please.

(Following proceedings resumed in open court before the jury):

THE COURT: Good morning, ladies and gentlemen.

Based upon a legal ruling which I have made in this case, I have declared a mistrial in the case which means the trial of this case is terminated at this point. The jury is excused from any further jury duty on this case.

I want to again thank you for your service and for your patience throughout the trial. Thank you very much, you are now excused.

MR. BOLDING: I want to thank you

also on behalf of George for being here. Thank you very much.

(Jury leaves courtroom and following proceedings held out of their presence):

MR. BOLDING: Your Honor, at this time I move for the release of Mr. Washington on his own recognizance and would ask that the Court, because of the posture of the case, grant such motion. Motion has been, previously set the bond in the amount of \$50,000 and we would ask that the Court reconsider that at this time and allow Mr. Washington to at least be able, if we're going to go for another few weeks here, at least be able to be out so that he can help me in preparing the case, so that he can help in the finding of additional witnesses and to hold him in jail is prejudicial to his rights. The Court was wrong in granting the motion and he should be released.

MR. BUTLER: Your Honor, the State would oppose any release of the defendant and we would request the defendant be continued to be held on the bond as previously set in this case. This is a defendant that has been convicted of first degree murder--

MR. BOLDING: He has not been convicted, it's been set aside according to

this prosecutor and the Supreme Court. He's never been convicted. It's just as if there were no trial.

THE COURT: Go ahead.

MR. BUTLER: Your Honor, this is a defendant that has, I think the posture is now we can use two felony convictions, one of which is armed robbery. The trial is due to begin on Tuesday and I would submit, your Honor, that the defendant should be held on the previous bond. A mistrial was granted, your Honor, because of argument of defense counsel, not because of anything that the State did.

I think his motion should be denied.

THE COURT: Motion will be denied. Anything further at this time.

MR. BUTLER: The State has nothing further, your Honor.

THE COURT: Stand at recess.

XV. Specific Statements (extracted from foregoing parts of the partial trial transcript) made to Judge Buchanan by Mr. Butler and Mr. McDonald During Argument For and Against Mistrial on January 10, 1977 on the subject of Jury Pre-Judice and Manifest Necessity.

[Pages 133 - 134]

[MR. BUTLER] "In AmJur they talked about, 58 Amjur 2d, 228, talk about any reference at a new trial, the result of a former trial or the same cause is improper. It should be at 58 Amjur 2d, 22 228 and the rule is 314. The Amjur citation goes on to indicate that the jury who are empanelled at the new trial must act upon their own responsibility and according to their own review of the testimony which is submitted to them entirely uninfluenced by the action of any of the jury."

[Page 134]

[MR. BUTLER:] "Your Honor, I think

that the rule 314 is mandatory, it says the former verdict and findings shall not be used. It doesn't say a defendant may waive that. I think what we have, your Honor, is a situation where, after the conviction of the defendant in this case, he has an excellent appeal point in that the jury was improperly influenced because they were told of the former conviction and, which I think defense attorney can argue on appeal, Mr. Bolding should not have done and it caused the defendant to not receive a fair trial."

[Page 139]

[MR. BUTLER] " I think now is the time the decision should be made as to whether or not Mr. Bolding has the right to introduce evidence of the Supreme Court decision in granting or in affirming the lower court's decision in granting a new trial. It's the opinion of the State that no curative instruction given by the Court could in this case adequately cure the damage that has been done by Mr. Bolding.

The State, the position of the State has been so prejudiced by his illegal and improper argument that the State feels that it is necessary to have a mistrial granted now."

[Pages 146-147]

[MR. BUTLER] "I think that because of Mr. Bolding's argument the case has gotten completely out of hand. I would suggest to the Court, your Honor, a mistrial is a manifest necessity at this time because of the conduct of Mr. Bolding and I would request that my mistrial motion be granted.

THE COURT: Thank you. Mr. Bolding."

[Page 157]

[MR. BUTLER] "I am convinced, your Honor, though, that because of the improper and illegal argument of Mr. Bolding in his opening statement, that manifest necessity indicates we've got to have a mistrial. He caused it."

[MR. McDONALD]: "I'll be very brief, your Honor. I just want to add one thing and that is, the Court's presented with a difficult problem no doubt but in looking at what was said and looking at this jury and looking at the State, given the discretionary nature in this trial it just seems inconceivable to me that this jury is so prejudiced at this time that they cannot give a fair trial to the State. Mr. Butler had admitted that with Mr. Bunting and other witnesses and the testimony of some witnesses he doesn't think will be here, that the matters that were mentioned are going to come out as impeachment material anyway, so I'm just asking the Court to look at the practical effect of what has been done and to make that judgment on the basis of the fact whether or not the State can proceed with a fair trial.

I don't think this jury is inflamed or impassioned at the State. I think there's material the State doesn't want them to know about ***"

[MR. BUTLER] "Your Honor, the reason the prosecutor's case is not what he thought it should be is because of the improper, illegal and unethical argument of defense counsel in his opening statement and because of that argument, that no instruction, had it been given immediately following the improper conduct, argument of defense counsel, no argument or instruction then and no instruction now can cure the prejudice that has been given. I assume, your Honor, that all the rules of criminal procedure, including rule 314, are designed to protect and ensure a fair trial for both sides. Mr. Bolding would have this Court find otherwise. He tells this Court about the Sianez case, records kept in the State prison and there a mistrial shouldn't have been granted.

I think it's one thing to have that kind of evidence in front of a jury and have them told to disregard it. I think it's an entirely different thing to have this jury told by the defense attorney that the highest court in the State of Arizona has considered this and the highest court in the

State of Arizona has said the State of Arizona through the County Attorney was guilty of misconduct.

I think this jury cannot fairly sit and decide this case knowing that"

[Page 172]

[MR. BUTLER] "Your Honor, we have, I think a situation where, because of the improper argument, the State cannot obtain a fair trial. I'm aware of the Burrell case. I'm aware that whether the granting of a mistrial is discretionary."

[Pages 172-173]

[MR. BUTLER] "Your Honor, I think that the motion for mistrial should be granted. I do not ask for the mistrial lightly. I know the consequences of my request and I do not ask because I fear anything other than the fact that this man right here has so prejudiced that jury that they will not be able to do what they are supposed to do, and that is give a fair trial to both sides.

THE COURT: I'm ready to rule."

XVI. Specific Statements (extracted from foregoing parts of the partial trial transcript made to Judge Buchanan by Mr. Butler, Mr. Bolding, and Mr. McDonald during Argument For and Against Mistrial on January 10, 1975 on the subject of Alternatives to Mistrial.)

[Page 139]

[MR. BUTLER] "I think now is the time the decision should be made as to whether or not Mr. Bolding has the right to introduce evidence of the Supreme Court decision in granting or in affirming the lower court's decision in granting a new trial. It's the opinion of the State that no curative instruction given by the Court could in this case adequately cure the damage that has been done by Mr. Bolding."

[Page 156]

[MR. BUTLER] "The State, your Honor, in this case has attempted to bring to the Court for its consideration legal authority. Mr. Bolding keeps telling us, "Later, Judge, later, I'll have it later." The time to make the decision on this admissibility of the Supreme Court opinion is now. He's already told the Court, the Jury, your Honor, that the reason a case is retried was because the Supreme Court found that the County Attorney's office willfully withheld evidence from the defendant, and I submit that that statement of Mr. Bolding cannot be cured, that the proper law is, that no reference to what happened at the last trial should be used***"

[Page 157]

[MR. BUTLER] "The only cure, your Honor, is a mistrial. The State is well aware that if the position I'm taking is wrong, if a mistrial is not proper, that man walks. I know that.

THE COURT: And I expressed my concern about that, Mr. Butler.

MR. BUTLER: I know that, your Honor. It's not something, it's not a statement that I make lightly. *** I don't think there's any way you can tell that jury now, "I don't want you to remember what Mr. Bolding told you about the Supreme Court granting a mistrial because of the misconduct of the County Attorney" and I think, your Honor, that the only decision is to have a mistrial granted now and the decision, now, I think should be made now, today as far as that evidence of the grand jury -- or excuse me, evidence of the Supreme Court opinion. We can't wait five days, six days, eight days down the line."

[Pages 167-168]

[MR. McDONALD] "I don't think this jury is inflamed or impassioned at the State. I think there's material the State doesn't want them to know about but it's clearly discretionary and if there is error, it seems to me that it's not the kind of error that has created a jury atmosphere that cannot render the State a fair trial, given [sic] the remedies which should be approached before mistrial such as cautionary instructions, things of that nature.

That's all I would have to add to what's been said."

[Page 169]

[MR. BOLDING] "If I'm wrong-- if I'm wrong in my analysis of 314 as being protective for the defendant, only as being protective for his right to a fair trial, as being protective for his rights so that a jury would not know there was a prior proceeding at which time he was found guilty. If I'm wrong then I ask the Court to instruct and admonish the jury that they will disregard statements that I made in regard to the prior -- a hearing by the Supreme Court or a decision by the Supreme Court-- if I'm wrong. I was unaware of 314 at the time, I mean unaware in the specific sense, your Honor. I'm aware of the rules in general. I was not aware specifically of 314 at the time any mention was made. Had I been aware of it, I think that I'm still correct in that it is protective of the defendant and was a rule that was put in force for his benefit ***"

[Page 170]

[MR. BUTLER] "Your Honor, the reason the prosecutor's case is not what he thought it should be is because of the improper, illegal and unethical argument of defense counsel in opening statement and because of that argument, that no instruction, had it been given immediately following the improper conduct, argument of defense counsel, no argument or instruction then and no instruction now can cure the prejudice that has been given."

[Page 171]

[MR. BUTLER] "Your Honor, I think my comments are the direct inference that can be drawn from what Mr. Bolding said in his argument. He stated that the Supreme Court overruled, that granted a new trial because the County Attorney or the prosecutor I think he said, willfully withheld evidence, suppressed, hid evidence. That's what he said. I think this jury cannot fairly sit and decide this case knowing that and I don't think any instruction is going to cure that."

1 IN THE
2 SUPREME COURT OF THE UNITED STATES
3 October Term 1977
4

5 No. 76-1168

6 STATE OF ARIZONA, RICHARD BOYKIN,
7 SHERIFF, PIMA COUNTY, ARIZONA,

8 Petitioner,

9 v.

10 GEORGE WASHINGTON, JR.,

11 Respondent.
12

13 OPPOSITION TO STATE'S PETITION FOR
14 WRIT OF CERTIORARI TO THE
15 UNITED STATES COURT OF APPEALS
16 FOR THE NINTH CIRCUIT
17
18
19

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21
22
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32

28 March 17, 1977
29
30
31
32

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1 OPPOSITION TO STATE'S PETITION FOR
2 WRIT OF CERTIORARI TO THE UNITED STATES
3 COURT OF APPEALS FOR THE NINTH CIRCUIT
4

5 The Respondent, GEORGE WASHINGTON, JR., by and through his at-
6 torneys, BOLDING, OSERAN & ZAVALA, by Ed Bolding, respectfully prays
7 that this Court refrain from exercising its extraordinary discre-
8 tion and thereby deny granting a Writ of Certiorari to review the
9 Judgment and Opinion of the United States Court of Appeals for the
10 Ninth Circuit, entered December 3, 1976, as amended January 20,
11 1977. (A copy of said Opinion is set forth and attached to Peti-
12 tioner's Writ as Appendix A.)

13 OPINION BELOW
14

15 On October 17, 1975, the Honorable James A. Walsh granted
16 WASHINGTON's Petition for Writ of Habeas Corpus. The Ninth Circuit
17 Court of Appeals affirmed Judge Walsh's Order on December 3, 1976,
18 as amended January 20, 1977.
19

20 QUESTION PRESENTED FOR REVIEW
21

22 Whether the double jeopardy clause bars the third reprosecu-
23 tion of Respondent, since the trial judge's granting of Petitioner's
24 Motion for Mistrial was without Respondent's consent and moreover,
25 the findings and particular record of the trial court, in granting
26 the mistrial, did not satisfy the tests of United States v. Perez,
27 22 U. S. 470 (1824), and its progeny.
28
29
30
31
32

1 STATEMENT OF THE CASE
2

3 Petitioner, in the Statement of the Case, has revealed only
4 some of the pertinent facts at bar, but has misstated and omitted
5 the most significant portions. This Statement will attempt to fill
6 the void, though Petitioner's general overview is fairly accurate.
7

8 For example, Petitioner acknowledges that a new trial was
9 granted after the first trial, but fails to apprise the Court of the
10 significant findings by the Supreme Court of Arizona that reflect a
11 hiding of evidence and misconduct on the part of the trial prosecu-
12 tors. In addition, Petitioner refers to the prosecutor's Voir Dire
13 of the second trial jury, wherein he referred to "two prior proceed-
14 ings." Petitioner does not advise the Court of defense counsel's
15 Voir Dire of the same prospective jurors in which the "prior pro-
16 ceedings" were explained as including a prior jury trial, all with-
17 out objection by Petitioner.

18 More importantly, Petitioner refrains from advising the Court
19 that during Voir Dire the prosecutor at GEORGE WASHINGTON, JR.'s,
20 second trial, consented, acquiesced, and agreed, that probable is-
21 sues would include the hiding of evidence and the misconduct or
22 wrongdoing on the part of Petitioner. Additionally, Petitioner
23 fails to disclose that the prosecutor in the second trial requested
24 and was afforded an opportunity to Voir Dire the jurors regarding
25 whether "evidence was hidden from George," whether the "State failed
26 to produce some evidence," whether "the State did something wrong
27 before," and whether jurors knew the reason "that the Motion for
28 New Trial was granted." (Transcript, p. 35, 36, attached hereto as
29 Appendix A.)

30 A reading of the entire transcript demonstrates that the pro-
31 secutor and the trial judge concurred that the hiding of evidence
32 and wrongdoing on the part of the State were prospective issues.
33 Consequently, the above-cited Voir Dire was conducted to ascertain

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whether any juror would be prejudiced and thus unable to serve if those issues were raised. (Transcript, p. 35, 36, 37, attached hereto as Appendix A.) Discussion among the prosecutor, defense counsel, and the trial court again reflected that the prosecutor understood that "hidden evidence" would probably be an issue. (Transcript, p. 53, 54, 55, attached hereto as Appendix B.)

Notwithstanding the foregoing agreement and Voir Dire conducted by both the court and respective counsel, and a continuation of the conduct in the prosecutor's Opening Statement, the prosecutor moved for a mistrial based upon use by defense counsel of virtually the exact words and issues described above. The court properly denied the Motion. The trial began, testimony of two witnesses was taken, and after the trial judge had warned the prosecutor about the pitfalls of an erroneous mistrial declaration and of the fact that the prosecutor had failed to object to any issues or statements made by defense counsel, the prosecutor's Motion for Mistrial was granted.

On page 11 of its Petition for Writ of Certiorari, Petitioner attempts to summarize the Opinion of the Ninth Circuit Court of Appeals, but misconstrues that court's ruling - implying that its basis is grounded in the trial court's failure to set forth "specific findings." To the contrary, the Ninth Circuit Court of Appeals ruled in pertinent part, as follows:

. . . We decline to imply from this impropriety that the jury was prevented from arriving at a fair and impartial verdict. If this was the case, the trial judge should have so found. He, at no time, however, indicates the reason(s) why he granted the mistrial. Furthermore, his short Order, quoted supra, is not susceptible to any inference that will fill this void. In the absence of any finding by the trial court, or any indication that the Court considered the efficacy of alternatives such as an appropriate cautionary instruction to the jury, we must conclude that neither of the tests of Perez ("manifest necessity" or "ends of public justice") has been met. We do not hold that these words are talismanic; we hold only that this particular record fails to reveal a "scrupulous exercise of judicial discretion," and that more consideration should have been given to Appellee's "valued right to have his trial completed by a particular tribunal." (Emphasis added.) State v. Washington, No. 75-3634, filed December 3, 1976, as amended January 20, 1977, p. 5. (A copy of said Opinion is set forth and attached to Petitioner's Writ as Appendix A.)

REASONS FOR DENYING THE WRIT

Petitioner's Questions Presented for Review and its reasons articulated for granting the Writ, were fully considered and properly rejected by both courts below. Petitioner asserts that the Opinion and Judgment of the Ninth Circuit Court of Appeals are in direct conflict with the Court's previous decisions and those of other United States Courts of Appeal. However, a reading of said Opinion and Judgment, accompanied by Petitioner's Questions Presented for Review reveals that said Opinion and Judgment are in harmony with those of other Courts of Appeal, in addition to the Court's decisions, and therefore, a review by the Court is not warranted. Equally significant is the fact that both decisions below, those of the United States District Court and the Ninth Circuit Court of Appeals, were proper and correct and were rendered after scrutinizing the entire record of the trial court.

Petitioner relies principally on four cases as evidencing the Ninth Circuit Court of Appeals' departure from the Court's previous Opinions and those of other Courts of Appeal. As set forth more fully below, those cases are manifestly distinguishable from the case at bench, concerning their facts, application of law to facts, and alternatives facing the trial judge.

First, Petitioner argues that the Judgment below was contrary to the tests mandated by the Court. In that regard, the State of Arizona (hereinafter referred to as State) maintains that the holding of the Ninth Circuit Court of Appeals was improper because the trial judge's Order failed to specifically state the basis for his granting the State's Motion for Mistrial. To the contrary, the court held:

We do not hold that these words are talismanic; We hold only that this particular record fails to reveal a "scrupulous exercise of judicial discretion" and that more consideration should have been given to Appellee's "valued right to

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1 have his trial completed by a particular tri-
2 bunal." State v. Washington, No. 75-3634,
3 filed December 3, 1976, as amended January 20,
4 1977, at page 5.

5 Petitioner contends that the court below misapplied the mis-
6 trial test as enunciated in Illinois v. Somerville, 410 U. S. 458
7 (1973). The State posits that the Somerville court emphasized that
8 rigid mechanical rules regarding mistrials would not be followed,
9 but rather a general approach premised on reasonable State policy
10 was appropriate. However, a reading of Somerville reveals that it
11 bears little resemblance to the case at bench. In Somerville, be-
12 cause of the nature of the defects in the indictment, it was impos-
13 sible to amend same under Illinois law. Since the trial court was
14 faced with virtually no alternative but to declare a mistrial, the
15 court did so and held, in pertinent part, as follows:

16 . . . Where the declaration of a mistrial imple-
17 ments a reasonable State policy and aborts a pro-
18 ceeding that, at best, would have produced a ver-
19 dict that could have been upset at will by one of
20 the parties, the Defendant's interest in proceed-
21 ing to verdict is outweighed by the compelling and
22 equally legitimate demand for public justice. Ill-
23 inois v. Somerville, supra, at 471.

24 As set forth above, the case at bar concerns a wholly dissimilar set
25 of facts and, moreover, no alternatives were foreclosed to the trial
26 court necessitating the mistrial declaration.

27 Petitioner further believes that implicit in the trial judge's
28 declaration of mistrial was a "finding" that the jury could not
29 reach an impartial verdict and therefore the judgment below is in
30 conflict with Somerville. Petitioner fails to grasp the signifi-
31 cance of the facts at bench and the nature and scope of Somerville
32 and the judgment below.

He (the trial judge) at no time, however, indi-
cates the reason(s) why he granted the mistrial.
Furthermore, his short Order, quoted supra, is
not susceptible to any inference that will fill
this void. In the absence of any finding by the
trial court, or any indication that the Court
considered the efficacy of alternatives, such as
an appropriate cautionary instruction to the jury,
we must conclude that neither of the tests of Per-

1 ez ("manifest necessity" or "ends of public jus-
2 tice") has been met. State v. Washington, supra.

3 Next, Petitioner contends that the trial court obviously de-
4 cided that an impartial verdict could not be reached and also that
5 a cautionary instruction to the jury could not cure the prejudice
6 and therefore declared a mistrial. Thus, the State asserts that the
7 trial judge properly exercised his discretion within the mandates
8 of Somerville and Perez. Plainly, Petitioner misses the import of
9 Somerville and Perez, and how their holdings harmonize with the
10 judgment below.

11 In addition, Petitioner alleges that defense counsel intention-
12 ally engaged in conduct calculated to necessitate a mistrial, and
13 as such, WASHINGTON should be estopped from raising double jeopardy
14 as a bar to further prosecution. The State analogizes defense coun-
15 sel's conduct to that exhibited by his counterpart in United States
16 v. Dinitz, _____ U.S. _____, 47 L. Ed. 2d 267 (1976). These
17 contentions are outrageous since they defy logic, the trial record,
18 and were not even raised before the United States District Court
19 for the District of Arizona. As the record so aptly demonstrates,
20 defense counsel's statement concerning "prior proceedings" was made
21 subsequent to respective counsels' agreement to address that issue
22 in Voir Dire in order to determine whether any prospective jurors
23 would be prejudiced by same - since it was to be a probable issue
24 during the trial.

25 More importantly, however, Petitioner's analysis of Dinitz is
26 faulty in that there the trial court and the parties considered all
27 alternatives to declaring a mistrial and thereafter, Defendant
28 moved for a mistrial which was granted. In view of the circum-
29 stances in Dinitz, the Court stated that the Perez tests were in-
30 apposite where a mistrial had been declared at the Defendant's re-
31 quest. In holding that a retrial was not barred, the Court held
32 that the record before it failed to reveal that the trial court's

1 action was motivated by bad faith or undertaken to harass or preju-
2 dice the Defendant. Significantly, here, the State seeks redress
3 for matters addressed in Voir Dire to which Petitioner consented.
4 There can be no legal dispute that the facts at bar are plainly dif-
5 ferent from those before the Dinitz court, and the judgment below
6 does not conflict with that in Dinitz.

7 Petitioner finally asserts that the court below did not look
8 to the record and circumstances surrounding the instant case. It
9 is abundantly clear that examination of the particular trial record
10 herein convinced both the United States District Court for the Dis-
11 trict of Arizona and the Ninth Circuit Court of Appeals that there
12 had been no scrupulous exercise of judicial discretion, nor had suf-
13 ficient consideration been given to WASHINGTON's valued right to go
14 to this particular jury and perhaps end the dispute with an acquit-
15 tal, which he was entitled to do. United States v. Dinitz, supra;
16 United States v. Jorn, 400 U. S. 470. Similarly, Petitioner's con-
17 tention is disposed of in the holding of the Ninth Circuit Court of
18 Appeals.

19 Second, the decision below does not conflict with those of
20 other Courts of Appeal. The State believes that United States v.
21 Potash, 118 F. 2d 54 (2nd Cir., 1941), establishes the Circuit
22 Courts of Appeal's view of the double jeopardy provisions of the
23 United States Constitution. Ostensibly, it cites Potash for the
24 proposition that where a mistrial is granted when eleven jurors re-
25 turn to the courtroom during their deliberations, but said is not
26 entered on the record, the appellate court can infer from the rec-
27 ord the reason for the mistrial declaration. Thus, the State seeks
28 to analogize that situation to the one at bench - that the inference
29 as to why the jury was discharged is obvious from the record. Res-
30 pondent respectfully directs this Court's attention to the Opinion
31 and Judgment of the Ninth Circuit Court of Appeals, as set forth
32 above. See also, United States v. Jorn, supra.

1 In addition, Petitioner suggests that the judgment below is
2 contrary to that of the Fourth Circuit as propounded in Whitfield
3 v. Warden of Maryland House of Corrections, 486 F. 2d 1118 (4th Cir.
4 1973). Whitfield is also factually distinct from the case at bar.
5 There, the court was concerned that one of the jurors had entered
6 the courtroom and had overheard remarks of counsel during Motions
7 for Judgments of Acquittal. Both defense counsel could not agree
8 as to what the trial court should do to cure any purported prejudice.
9 The court there was left with little alternative but to declare a
10 mistrial. Significantly, the Fourth Circuit indicated that interro-
11 gation of the juror would have been proper under those circumstances.
12 Thus, Whitfield is not contrary to the judgment below, but merely
13 exemplifies a different decision reached under different circumstan-
14 ces, but by application of the same legal precepts.

15 Furthermore, the State asserts that the judgment below is in
16 conflict with the Fifth Circuit Opinion in Smith v. Mississippi,
17 478 F.2d 88 (5th Cir., 1973). Smith differs from the case at bench
18 in that there the trial court:

19 . . . made a sincere effort to determine whe-
20 ther "the ends of public justice," Perez, su-
21 pra, would be better obtained by declaring a
22 mistrial and beginning anew. He (the trial
23 judge) was sensitive to the opposing require-
24 ments on his discretion. * * * What is of
25 controlling importance is that the State
26 trial judge first painstakingly weighed all
27 the factors present and thereupon exercised
28 the discretion invested in him. His declara-
29 tion of mistrial was not unreasonable. Smith
30 v. Mississippi, supra, at 96.

31 Thus, Smith is distinguishable from Washington in that the Smith
32 court engaged in a meticulous and scrupulous exercise of its dis-
cretion which is not the case presently before the Court.

33 In Washington, we have the State seeking redress after the
prosecutor agreed and consented to the precise notions which defense
counsel articulated in his Voir Dire and Opening Statement. The
judgments below were correct and proper and do not warrant the

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Court's granting the State a Writ of Certiorari. What is self-evident from all the foregoing is that the purported distinctions suggested by Petitioner are, in truth and in fact, various results reached under differing circumstances, but arrived at by application of Perez and its progeny, and as such, compel the Court to deny granting the State's Petition.

Respectfully submitted this 17th day of March, 1977.

BOLDING, OSERAN & ZAVALA

By

Ed Bolding

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Attorneys for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1977

No. 76-1168

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA

Petitioner,

v.

GEORGE WASHINGTON, JR.,

Respondent.

APPENDIX

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March 17, 1977

1 excused at this time. Remain outside the court-
2 room, please.

3 I don't really know, this examination at this
4 point is necessary. I will hear counsel on it.
5 I think everything has been brought out, pretty
6 much made known to the jurors.

7 MR. BOLDING: I do not see the necessity,
8 your Honor.

9 THE COURT: I was a little concerned with
10 the poisoning of the panel, that someone might
11 blurt out—Mr. Butler?

12 MR. BUTLER: My only concern, Judge, would
13 be, and it really depends on what Mr. Bolding
14 intends to do, and that is as he has said in his
15 voir dire, that the evidence was hidden from George,
16 that will come out, if any of these individuals
17 know that the motion for a new trial was granted
18 because the State failed to produce some evidence,
19 if that fact would cause them to feel at this time,
20 or that they would have some prejudice against the
21 position of the State because of that, and I think
22 if they had such a feeling, if they have such
23 knowledge, that we should examine whether or not
24 that would cause them to be prejudiced.

25 THE COURT: All right.

26 MR. BUTLER: And frankly, Judge, because

1 it's been opened up to everybody, it almost seems
2 to me that it might be better to ask the entire
3 panel about that. Now, I don't know if Mr. Bolding
4 is prepared to take the tack, that the State did
5 something wrong before and because he did, the
6 State did something wrong before, you should let
7 this man off now. I don't know if he's prepared
8 to argue that way or not. I got the impression
9 that he might be and if there's any attitude like
10 that, I think I should be able to determine that,
11 and I almost think there may be a necessity to ask
12 all of the people that question because I think
13 he opened an awfully wide door.

14 THE COURT: Well, I think we're getting
15 ahead of ourselves as to whether or not anything
16 is going to be admissible.

17 MR. BOLDING: I don't care.

18 THE COURT: The extent of the admissibility,
19 and I think you're waving a red flag by doing that.
20 I think with the extensive voir dire examination
21 by each of you, I just don't see how you could
22 conceive that you're going to get any response from
23 this jury panel to the contrary.

24 MR. BOLDING: Bates, your Honor—I don't
25 know, I'm not going to say he doesn't have the
26 right to inquire about that kind of situation.

1 I'm not going to say that he does but I don't know,
2 in good conscience, that I can say that he doesn't
3 have the right to inquire as to whether they might,
4 you know, have some bad feelings toward the County
5 Attorney's office because of that situation. I just,
6 I don't know. I really hadn't considered it from
7 that standpoint.

8 THE COURT: If you assert your desire to
9 ask that question, you absolutely want to, I guess
10 you're entitled to do it.

11 MR. BUTLER: I'd like, Judge, to ask the
12 individuals that indicated a knowledge of the case,
13 if they know why it was retried.

14 THE COURT: All right, let's call—

15 MR. BUTLER: To see what their knowledge
16 has been.

17 THE COURT: Been to the extent of the jurors
18 who have indicated.

19 MR. BUTLER: Right, I think we can just
20 ask them what they know and then that other question.

21 THE COURT: I believe the next one was Mr.
22 Edmanson.

23 MR. BUTLER: Leonard Porter, Judge.

24 THE COURT: Beg your pardon?

25 MR. BUTLER: Leonard Porter.

26 THE COURT: Did Mrs. Flores indicate prior

3 THE COURT: Thank you, Mr. Curry. I'll
4 just excuse you for the time being, if you wait
5 outside the courtroom.

6 MR. CURRY: Thank you.

7 THE COURT: Thank you, very much sir.

8 Thirty-four prospective jurors in the box I
9 believe at this point.

10 I would propose that you just go ahead and
11 begin with your challenges, making your challenges.
12 Am I forgetting something?

13 MR. BOLDING: Well, the only thing I've
14 gotten concerned about, Bates's statement a minute
15 ago as to whether he might have, as to whether we
16 ought to go into the—I didn't ask whether any of
17 them knew the reason for a new trial. I know I
18 didn't do that and, you know, somebody may have
19 a misapprehension about that.

20 THE COURT: That was his request and I
21 think his election was he would examine, only those
22 jurors who were called in.

23 MR. BOLDING: I didn't know he waived that,
24 the right to go back in against the rest of them.
25 Well, that's fine.

26 THE COURT: Are you making that request,

3 THE COURT: All right, do you see any
4 reason for calling them all back in, excusing
5 them.
6 MR. BUTLER: No.
7 THE COURT: The Bailiff may tell the jurors
8 that we'll be at recess for another twenty minutes
9 or so, can go get a cup of coffee. Is that
10 agreeable?
11 MR. BOLDING: Or thirty.
12 THE COURT: Thirty, yes, I appreciate that.
13 MR. BUTLER: I have one question, Judge.
14 In our selection, I know that Mr. Bolding said I
15 get my shot at ten and he gets his shot at ten.
16 What I'm wondering is if I might not examine the
17 panel and make those strikes that I feel compelled
18 to make at this time and if I don't make ten
19 strikes, if I might make those strikes I have
20 left over after Mr. Bolding makes his, and if he
21 hasn't finished, then he can come back and do it
22 again but I—
23 THE COURT: That's contrary to the rules,
24 isn't it? Don't the rules require the prosecutor
25 to make all his strikes before the—
26 MR. BOLDING: The simple answer is yes,

3 MR. BUTLER: All right.
4 THE COURT: I think if you don't take all
5 your strikes, at least under the new rule, then
6 the first, goes down to the bottom of the list and
7 strikes them and the first fourteen remaining are
8 the jury panel.
9 MR. BUTLER: Right, that's my—I have one
10 other thing we can do after we pick the jury.
11 It's a legal matter and it's about Mr. Bolding's
12 statement about introducing evidence that was
13 hidden the last time around and what concerns me
14 is my—I may, if Mr. Bolding gets into that, I may
15 call Mr. Bolding as a witness. This is a con-
16 cern of our office that we expressed when Mr.
17 Bolding was reappointed in this case and I
18 obviously don't know what he's going to do about
19 hidden evidence but if he brings on an individual
20 named Hanrahan on the stand or if he starts talk-
21 ing about Mr. Hanrahan, I will call Mr. Bolding
22 as a witness.
23 THE COURT: I wouldn't imagine we'll get,
24 if we handle the opening statements this afternoon,
25 that will probably be as far as we get.
26 MR. BOLDING: I don't see how we can get

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 76-1168

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA,

Petitioner,

v.

GEORGE WASHINGTON, JR.,

Respondent.

NOTICE OF APPEARANCE

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Attorneys for Respondent

March 17, 1977

No. 76-1168

State of Arizona, Richard Boykin,
Sheriff, Pima County, Arizona,(Petitioner ~~XXXXXXXX~~)

vs. George Washington, Jr.,

(Respondent ~~XXXXXXXX~~)

The Clerk will enter my appearance as Counsel for Respondent George Washington,
Jr.,

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae
☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature

Edward P. Bolding (Ed Bolding)

(Type or print) Name

Edward P. Bolding (Ed Bolding)

Firm

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NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a particular individual to whom notification is to be sent, with the understanding that if other counsel should be informed he will perform that function. The person to be notified in this case is:

(Type or print) Name Ed Bolding

Firm

BOLDING, OSERAN & ZAVALA

Address

P. O. Box 70

City & State

Tucson, ArizonaZip 85702

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED

CO-73

State of Arizona, Richard J. Boykin

~~XXXXX~~ Petitioner

vs.

No. 76-1168

George Washington, Jr.

~~XXXXX~~ Respondent

To Ed Bolding, Counsel for ~~Respondent~~ Respondent:

YOU ARE HEREBY NOTIFIED that ~~xxxxxxx~~ a petition for a writ of certiorari—in the above-entitled and numbered case was docketed in the Supreme Court of the United States on the 23rd day of February, 1977.

At the request of the Clerk of the Supreme Court, we are sending attached hereto an appearance form to be filed by you, or other counsel who will represent your party, with the Clerk at or before the time you file your response to our petition or jurisdictional statement.

John R. McDonald

Counsel for ~~XXXXXX~~ Petitioner

c/o Pima County Attorney's Office
111 West Congress

Number and Street

Tucson, Arizona 85701

City, State and Zip Code

NOTE: Please indicate whether the case is an appeal or a petition for certiorari by crossing out the inapplicable terms. A copy of this notice should not be filed in the Supreme Court.

CO-75

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 76-1168

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA,

Petitioner,

v.

GOERGE WASHINGTON, JR.,

Respondent.

PROOF OF SERVICE

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March 17, 1977

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P.O. BOX 70 TUCSON, ARIZONA 85702 (602) 884-7100

PROOF OF SERVICE

STATE OF ARIZONA)
) SS:
COUNTY OF PIMA)

I, ED BOLDING, attorney of record for GEORGE WASHINGTON, JR., Respondent, depose and say that on the 17th day of March, 1977, I served a copy of the foregoing Opposition to State's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on John R. McDonald, Special Deputy Pima County Attorney, Ninth Floor, Pima County Courthouse, Tucson, Arizona 85701, attorney for Petitioner, by depositing the same in a United States Post Office mail box with postage prepaid, addressed to him at the above-mentioned address.


Ed Bolding

SUBSCRIBED AND SWORN to before me this 17th day of March, 1977, by Ed Bolding.

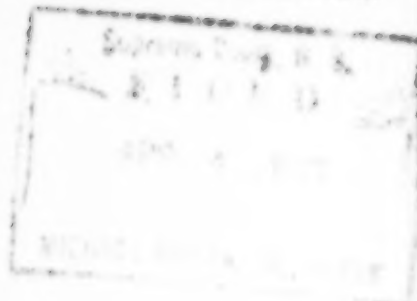

Notary Public

My commission expires:

Jan. 28, 1979

LAW OFFICES
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. _____

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA

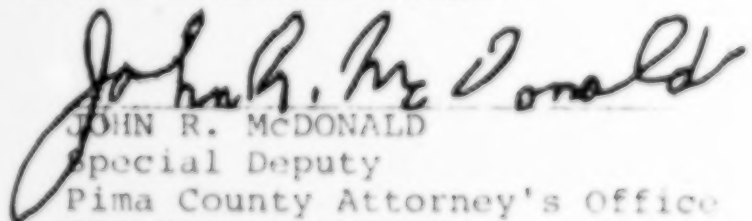
Petitioner,

-VS-

GEORGE WASHINGTON, JR.,

Respondent.

REPLY BRIEF TO RESPONDENT'S OPPOSITION
TO STATE'S PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT


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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. _____

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA

Petitioner,

-vs-

GEORGE WASHINGTON, JR.,

Respondent.

REPLY BRIEF TO RESPONDENT'S OPPOSITION
TO STATE'S PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

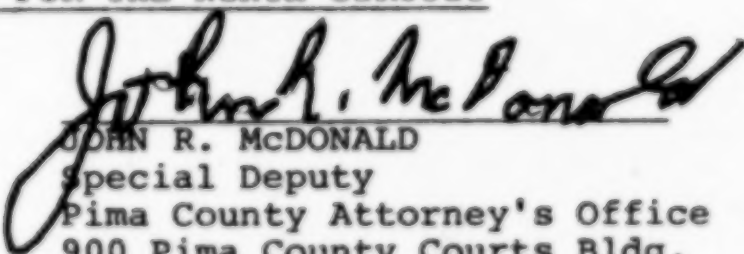

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Attorney for Petitioner.

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The State of Arizona, Petitioner, requests permission to file this reply brief pursuant to Rule 24, United States Supreme Court Rules, addressing the improper use of evidence not in the record by the Respondent Washington in his Opposition to the State's Petition for Writ of Certiorari to the United States Court of Appeals.

The Respondent Washington has placed before this Court of last resort six (6) pages of a fifty-six (56) page transcript which was not a part of the record before the Ninth Circuit Court of Appeals or the United States District Court. (Respondent's Appendices A and B)

Specifically, the Respondent has referred to six (6) pages of the Superior Court transcript of the Jury Trial of January 8, 1975, Mr. Bolding's Voir Dire of the Jury Panel.

The Respondent has incorrectly stated in his Reply Brief that the decisions below by the United States District Court and the Ninth Circuit Court of Appeals were "rendered after scrutinizing the entire record of the trial court." (Respondent's Opposition to State's Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit, p.4, lines 15 and 16.).

In fact, the material cited by the Respondent Washington in his appendices was never before the Ninth Circuit Court of Appeals or the Federal District Court.

On July 15, 1976, Judge Chambers of the Court of Appeals for the Ninth Circuit specifically ruled that the whole transcript, including the material cited by the Respondent to this Court, was not to be incorporated into the

record on appeal. (See Appendix A herein). A motion to supplement the record on appeal to include the entire transcript in question was filed by the State. (See Appendix B herein), and the Respondent Washington by written opposition vigorously opposed the State's motion. (See Appendix D herein).

The State strongly contends that the lower courts would have reached a different result if the transcript in question had been before them in the case at bar since the transcript shows the trial judge believed the jury panel would be "poisoned" and unable to render a fair and impartial verdict if it learned of the reason for the Respondent's new trial.

The State of Arizona submits that the Respondent's reference to six (6) pages of a fifty-six (56) page trans-

cript not on the record is inappropriate before this Court. However, since the material is now before the Court, the State requests that in order to clarify misrepresentations made by the Respondent regarding the transcript that the whole transcript be made a part of the record at this time. Reference to the whole transcript, demonstrates how the Respondent has misconstrued the language contained in his appendices "A" and "B".

A close examination of Respondent's appendices clearly shows that the Respondent entirely misrepresented the language contained therein. Rather than demonstrate any acquiescence or agreement by the prosecutor that claims of hidden evidence or prosecutorial misconduct were relevant trial issues, the Respondent's appendices unequivocally show that the only matter acquiesced

in or agreed upon was that if any jurors knew of the reasons for the new trial of Respondent those jurors might be prejudiced and thus unable to render a fair and impartial verdict. The sole purpose of the voir dire contained in Respondent's appendices and the transcribed proceedings they are a part of was to find and exclude from the jury anyone with knowledge of the reason for the new trial.

In addition, while the State of Arizona does not believe the trial judge was required to couch his reasons for a mistrial in words of "manifest need" or an "impartial verdict," the Respondent's appendices prove that the trial judge, realizing the consequences of a mistrial decision, felt there was a potential and developing legal basis for a mistrial. In considering

the propriety of the jury panel knowing the reason for the new trial, the trial judge expressed "he was a little concerned with the poisoning of the panel, that someone might blurt out --."

(Respondent's Appendix A, p. 35, lines 9 - 11). Thus, the above language of the trial judge, had the complete trial court record been before United States District Court Judge James A. Walsh in the Federal habeas corpus hearings, would have answered Judge Walsh's concern that the State trial "[j]udge doesn't anywhere say, that I can find, why he believes that . . . it's not going to be possible for the jury to be impartial or render an impartial verdict." (Appendix E herein); Record on Appeal, "Reporters Partial Transcript of Proceedings in the District Court of October 2, 1975,

"Mr. Butler's argument, pages 4 - 5, lines 12-2).

The language of the trial judge about the potential for the "poisoning of the panel" alleviates the doubt that Judge Walsh apparently had that the trial judge was just "going along" with the prosecutor's request for a mistrial. It is obvious from his choice of words that the trial judge himself recognized the potential legal basis for a mistrial if the jury panel were "poisoned" by discovering the reason for the new trial.

This concern of the trial judge occasioned a painstaking interrogation by the Court and the prosecutor to determine that no one juror knew or even guessed the reason for the new trial. Nevertheless, despite the deliberate interrogation in voir dire on this issue of the reason for a

new trial, Respondent's counsel did "blurt out" the reason for the new trial in his opening statement.

This "blurting out" by Respondent's counsel by declaring that the Arizona Supreme Court had condemned the prosecutor for misconduct by withholding evidence and had granted a new trial became the compelling reason for the trial judge to declare a mistrial. The trial judge obviously believed that this improper argument by Respondent's counsel had "poisoned" the trial jury and rendered the trial jury unable to arrive at a fair and impartial verdict.

Respondent contends that the cases in the State's Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals are not applicable because of their particular facts. While the State recognizes that each decision

is based on the particular facts of that case, nevertheless the legal principles involved should be consistently applied. Contrary to Respondent's argument, the essence of Illinois v. Somerville, 410 U.S. 458 (1973) and United States v. Potash, 118 F.2d 54 (2d Cir., 1941) is that rigid mechanical rules regarding mistrials are not to be applied by the trial judge in exercising his discretion. The principle of United States v. Dinitz, ____ U.S. ____, 96 S.Ct. ____, 47 L.Ed.2d 267 (1976) that when defense counsel's conduct necessitates a mistrial, the defendant should be barred from raising a double jeopardy defense is especially relevant to the instant case because the transcript cited by the Respondent in his Reply Brief shows that defense counsel knew that

matters relating to the reasons for a new trial were not to be discussed before the jurors.

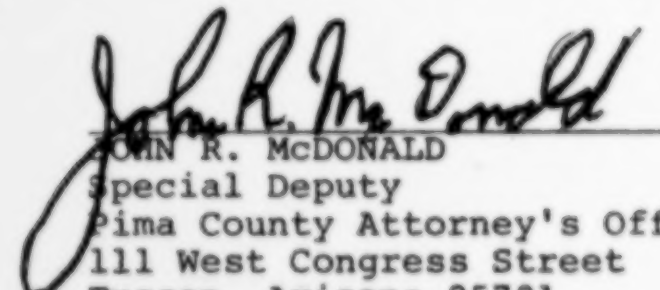
CONCLUSION

In conclusion, the State of Arizona respectfully requests that because the Respondent Washington has improperly introduced before this Court selective parts of a transcript not in evidence that the whole transcript now be admitted before this Court.

Although the State strongly believes that the trial court need not use talismanic language regarding the granting of a mistrial, such language is in fact found in the material cited by the Respondent in his Reply Brief. The transcript referred to by the Respondent clearly shows that defense counsel knew that the trial judge was

concerned that the jury panel could become "poisoned" by learning of the reasons for a new trial and yet defense counsel specifically told the jury these reasons in his opening statement. Because the whole transcript supports the State's position before this Court, the State requests that the entire transcript now be introduced before the Court.

Respectfully submitted this 31st
day of March, 1977.


JOHN R. McDONALD
Special Deputy
Pima County Attorney's Offc.
111 West Congress Street
Tucson, Arizona 85701
Attorney for Petitioner

(handwritten)

July 15, 1976 -

The motion to supplement the record is denied because the material was not before Judge Walsh. If appellee has imported into the record here material that was not before Judge Walsh, appellant should move to strike it.

(s) R. H. Chambers, Judge.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE WASHINGTON, JR.,)
Appellant,) No: 75-3634
vs.) (United States
THE STATE OF ARIZONA,) District Court
WILLIAM C. COX, Sheriff,) No. CIV-75-85-
Pima County, Arizona,) TUC-JAW)
Appellee.)
_____)

MOTION TO SUPPLEMENT THE RECORD ON
APPEAL

DENNIS DeCONCINI
PIMA COUNTY ATTORNEY

(s) A. BATES BUTLER III

A. Bates Butler, III
Deputy County Attorney
900 Pima County Courts Bldg
111 West Congress Street
Tucson, Arizona 85701

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE WASHINGTON, JR.,)
Appellant,) No: 75-3634
vs.) (United States
THE STATE OF ARIZONA,) District Court
WILLIAM C. COX, Sheriff,) No. CIV-75-85-
Pima County, Arizona,) TUC-JAW)
Appellee.)
_____)

MOTION TO SUPPLEMENT THE RECORD
ON APPEAL

COMES NOW Appellee, the State of Arizona and William C. Cox, Sheriff, Pima County, Arizona ("the State") and, pursuant to Rule 10 (e) of the Federal Rules of Appellate Procedure, moves to supplement the contents of the Record on Appeal, specifically, Appellant's (now Appellee's) Exhibit No. 1, in Case No. 75-3634, with the following;

- (1) Superior Court Transcript of Jury Trial, January 8, 1975, Mr. Edward Bolding's Voir Dire of Jury Panel.

As this Court is aware from the State's "Notice Pursuant to Rule 10 (b)" [Record on Appeal, page 229], the State's primal issue on appeal, and correspondingly, the meat of the State's brief, is "[w]hether the District Court erred in granting Petitioner a Writ of Habeas Corpus for the stated reason that the State trial court did not expressly state in his order that manifest necessity existed for granting the State's Motion for Mistrial." (An issue inseparably entwined in the State's appeal--whether manifest need existed for the State trial court to declare a mistrial--is also discussed by the State in its brief.) This mistrial occurred at a second trial of George Washington, Jr. ("Washington") upon request of the Deputy County Attorney, over Washington's objection, because of defense counsel's prejudicial remarks to the jury in his opening statement. The supplemental material, the Transcript of the Jury Trial ("Supplemental Transcript"), represents a portion of Washington's second trial. This portion has heretofore never been transcribed. The other portion of the transcript of Washington's second trial, already before this court as part of the Record on Appeal [see above], was transcribed January 15, 1975. Therein, the court reporter outlined this previously untranscribed portion which the State now wishes to include in the Record on Appeal--
"(Following proceedings were resumed in open court, another roll call of the jurors and voir dire examination of prospective

jurors by Mr. Bolding, whereupon a recess was taken and several jurors called in and questioned individually by the Court and counsel and another recess was taken for the purpose of allowing the attorneys to strike prospective jurors.)" Record on Appeal, Appellant's Exhibit No. 1, "Jury Trial of January 8, 1975, Superior Court, page 44, lines 12-19.

The State was not the party who requested the original transcription and therefore does not have knowledge or remember why the proceedings in the Supplemental Transcript were excluded therefrom. However, the State believes the Supplemental Transcript is imperative for this Court's eventual decision of the case at bar, which naturally entails a full understanding of the events that transpired at Washington's second trial.

The language of the foregoing statement of the State's issue on appeal itself announces that this issue was first created by the ruling of the district court wherefrom the State has appealed to this Court. During Washington's federal habeas corpus hearing, held October 2, 1975, United States District Court Judge James A. Walsh sua sponte challenged the State with the problem that Superior Court Judge Robert B. Buchanan, in Washington's second trial, did not express "finding" that manifest necessity existed for a mistrial. Judge Walsh was concerned that, from

APPENDIX B

the record before him, Judge Buchanan "doesn't give any indication" that he thought defense counsel's remarks might cause the jury to reach an improper result [Record on Appeal, "Reporter's Partial Transcript of Proceedings in the District Court of 12/2/75", Mr. Butler's argument, page 3, lines 7-14]; that the State trial "[j]udge doesn't anywhere say, that I can find, why he believes that . . . it's not going to be possible for the jury to be impartial or render an impartial verdict" [*ibid.*, pages 4-5, lines 23-2]. Judge Walsh also expressed repeated concern with Judge Buchanan's attitude, that Judge Buchanan was perhaps "inclined to go along with [the County Attorney] after [the County Attorney] told him, 'Look, I know the consequences. . .'" of a mistrial declaration [*ibid.*, page 9, lines 21-24]. The State is aware that the Supplemental Transcript was not part of the record before the district court's consideration.¹ However, since the State's primary issue on appeal to this Court was first raised by Judge Walsh himself, neither party had briefed the issue to the District Court, nor had either party considered beforehand the presentation or reference to evidence, such as statements made on the record by Judge Buchanan, that might signify to Judge Walsh a legal expression sufficient to support a mistrial ruling. In other words, the State's issue on appeal to this Court which makes this previously untranscribed portion of Washington's second trial now relevant and essential to the outcome of the case, was not an

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1. The State wishes to point out that the Record on Appeal already includes material that was not before Judge Walsh's consideration in the habeas corpus proceeding, namely, Cross-Appellant's Exhibit A, placed in the Record by Washington before transmittal to this Court.

issue presented by the parties to the District Court. Judge Walsh himself raised it in oral argument.

While the State realizes an argument of its appeal is misplaced in this Motion, some discussion of the pivotal issues therein is necessary in explanation of the reasons why the Supplemental transcript is so necessary to a complete record for the State's appeal. This Court will be deciding whether or not Judge Buchanan had to correct his reasons for a mistrial in view of "manifest need," or "an impartial jury". The State will adamantly argue that he has no such requirement, but the addition of this supplemental transcript to the Record on Appeal will serve to alleviate doubt that, before the County Attorney told the trial court he knew the consequences of his request, Judge Buchanan himself felt there was a potential and developing legal basis for a mistrial, that he was not just "going along" with the County Attorney--a doubt which apparently played a major role in Judge Walsh's decision. On this important point, Judge Buchanan, during initial voir dire, expressed he "was a little concerned with the poisoning of the panel, that someone might blurt out--". Supplemental Transcript, page 35, lines 9-11. This concern occasioned a painstaking interrogation by Judge Buchanan and the County Attorney to determine that no one juror knew or even guessed the reason for the new trial (which interrogation can be shown only by

the Supplemental Transcript). Nevertheless, even after the deliberate interrogation, "someone", namely defense counsel, did, in fact, twice "blurt out" the reason for the new trial in his opening statement. As the Court will find in the State's brief, this "blurting out" finally became the compelling reason for Judge Buchanan to declare a mistrial.

In Turk v. United States, 429 F.2d 1327, 1329 (8th Cir. 1970), the Eighth Circuit was presented with an issue substantially similar to the issue before this Court, and ruled as follows:

"In its appellate brief the government refers to additional evidence of probable cause contained in the transcript of the preliminary hearing held before the United States Commissioner on December 3, 1968. This testimony was not presented to the district court and was not otherwise made a part of the record on this appeal. Fed.R. App.P. 10 (a). However, in the interest of justice this court may order the record enlarged for purposes of reviewing the issue of probable cause." (Emphasis added.)

To the same effect is Gatewood v. United States, 209 F.2d 789 (D.C. Cir. 1953) where the Court recognized but ignored the usual rule that if a party fails to bring up a sufficient record

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to reveal the error he alleges, his appeal must fail. The Court instead followed a procedure which seemed to them "called for in the interest of both parties, and of the due administration of justice" [209 F.2d 789, 792 n. 5] and supplemented the record under the following rationale:

"Appellate consideration of the ultimate question in a case must not be frustrated by the parties' failure to include in the record preliminary proceedings which were in reality part of the trial process, and which might be found to be of vital significance." Ibid.

Accord, Phillips Petroleum Company v. Williams, et al., 159 F.2d 1011, 1012 (5th Cir. 1947).

The reasoning of both Turk and Gatewood seems particularly compelling in the case at bar. In Turk, the basic issue on appeal was probable cause for an arrest to justify a warrantless search, and the reviewing Court allowed evidence regarding probable cause to supplement the record. In the case at bar, the basic issue on appeal stems from Judge Walsh searching the record before him for some indication of Judge Buchanan's expressed attitude that the jury was becoming partial, for some indication of what was in the State trial judge's mind. This Supplemental Transcript fills a huge gap in report colloquy between counsel and the jurors and between

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counsel and the court, and serves to illuminate the State trial court's mindful consideration, through express statements, of developing prejudice in the jury. The Supplemental Transcript therefore serves to militate against Judge Walsh's arguments, and shores up the State's contention, which will be made in its Brief, that Judge Buchanan, practically from the outset of the trial, was constantly concerned that the jury not become prejudiced against either the State or the defendant. Without this Supplemental Transcript, this Court will not be nearly as well-equipped to decide the issue that the State presents. The State respectfully requests that since the State's primal issue on appeal was not brought before the parties until the district court's ruling, and in the interest of justice to both parties to the appeal, the Record on Appeal in Case No. 75-3634 be supplemented with the Superior Court Transcript of Jury Trial, January 8, 1975, of Mr. Edward Bolding's Voir Dire of the Jury Panel.

Dated this (7) day of July, 1976.

Respectfully submitted,

DENNIS DeCONCINI
PIMA COUNTY ATTORNEY

(s) A. BATES BUTLER III

A. Bates Butler, III
Deputy County Attorney

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GEORGE WASHINGTON, JR.,)	
Appellant,	) No. 75-3634
vs.	) (United States
	) District Court
THE STATE OF ARIZONA,	) No. CIV-75-85-
WILLIAM C. COX, SHERIFF,	) TUC-JAW)
Pima County, Arizona.)
)

Pursuant to the suggestion of Chief Judge Chambers in his Minute Order of May 19, 1976 in Cause 75-3634, United States Court of Appeals for the Ninth Circuit, I have examined the transcript material described on Page #1 of Appellant's Motion to Supplement the Record on Appeal filed in said Cause 75-3634 on May 6, 1976, and I certify that such material was not before me when I heard and decided Appellant's application for a Writ of Habeas Corpus in Cause No. 75-85-Tucson (JAW), in the United States District Court for the District of Arizona.

Dated at Tucson, Arizona: June 2, 1976.

(S) James A. Walsh
United States District
Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE WASHINGTON, JR.,)
Appellant,) No: 75-3634
vs.) (United States
THE STATE OF ARIZONA,) District Court
WILLIAM C. COX, Sheriff,) No. CIV-75-85-
Pima County, Arizona,) TUC-JAW)
Appellee.)
_____)

OPPOSITION TO MOTION TO SUPPLEMENT
RECORD ON APPEAL

BOLDING, OSERAN & ZAVALA

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APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE WASHINGTON, JR.,)
Appellant,) No: 75-3634
vs.) (United States
THE STATE OF ARIZONA,) District Court
WILLIAM C. COX, Sheriff,) No. CIV-75-85-
Pima County, Arizona,) TUC-JAW)
Appellee.)
_____)

OPPOSITION TO MOTION TO SUPPLEMENT
RECORD ON APPEAL

COMES NOW Appellant, GEORGE
WASHINGTON, JR., by and through his
attorneys, BOLDING, OSERAN & ZAVALA,
by Ed Bolding, and herewith opposes
Appellee, STATE OF ARIZONA's Motion to
Supplement the Record on Appeal, for
the reasons set forth below in the
Memorandum of Points and Authorities.

Respectfully submitted this 8th day
of July, 1976.

BOLDING, OSERAN & ZAVALA

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APPENDIX D

MEMORANDUM OF POINTS AND AUTHORITIES

On April 30, 1976, Appellee, STATE OF ARIZONA, filed its first Motion to Supplement Record on Appeal. Thereafter, on May 19, 1976, the Honorable Richard H. Chambers, of this Court, ruled as follows:

Denied without prejudice. From Judge Walsh's Order of August 5, 1975, I conceive it possible that Judge Walsh did examine and consider the material which the U. S. Attorney now desires to put in the record.

Perhaps Judge Walsh can file in a Memorandum in his Court's file that will clear up the matter and then a new application can be made.

On June 2, 1976, Judge Walsh certified:

. . . I have examined the transcript material described on Page #1 of Appellant's Motion to Supplement the Record on Appeal filed in said Cause 75-3634 on May 6, 1976, and I certify that such material was not before me when I heard and decided Appellant's application for a Writ of Habeas Corpus in Cause No. 75-85- Tucson (JAW), in the United States District Court for the District of Arizona.

APPENDIX D

Now, the STATE has renewed its same Motion to Supplement the Record on Appeal with the single exception that the deposition of Alonzo Rodriguez is not again offered for supplementation.

It is well-settled that a United States Court of Appeals may only consider the facts and evidence which were made a part of the record in the District Court. Rule 10(a) Federal Rules of Appellate Procedure. In denying the government's Motion to Supplement the Record on Appeal, the Seventh Circuit Court of Appeals stated the following:

We do not think Rule 10(e) of the Federal Rules of Appellate Procedure gives us authority to admit on appeal a document, file, or series of papers, which neither were introduced into evidence, nor, in any manner, made a part of the record in the District Court. United States ex rel Kellogg v McBee, 452 F 2d 134 (7th Cir., 1971).

See Dictograph Products Company v. Sonotone Corporation, 231 P 2d 867 (2nd Cir., 1956). In Borden, Inc., v. FTC, 495 F 2d 785 (7th Cir., 1974), again the Seventh Circuit Court of Appeals denied a Motion to Supplement or Enlarge the Record on Appeal, stating:

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[R]ule 10(e) does not give this Court authority to admit or appeal any document which was not made part of the record in the District Court.

In Gill v. Turner, 443 F 2d 1064, 1065 (10th Cir., 1971), Appellant attempted to expand the Record on Appeal to include a transcript of an arraignment which was not introduced at the trial court level. In rejecting Appellant's Motion the Court stated:

Suffice it to say in this regard that the record as previously made before the trial court cannot be thus expanded when the matter is on appeal before us. Our task here is to review the finding and judgment of the trial court in light of the record before it.

Additionally, in United States ex rel Bradshaw v. Alldredge, 432 F 2d 1248, 1250 (3rd Cir., 1970), the Court noted:

It is, of course, black letter law that the United States Court of Appeals may not consider material or purported evidence which was not brought up on a record in the trial court.

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To the same extent in Weiss v. Burr, 484 F 2d 973, 989 (9th Cir., 1973), this Court refused to supplement the record subsequent to issuing its opinion when Appellant sought to supplement the record with his Petition for Rehearing, stating:

[T]his we refuse to do, since as heretofore stated, that transcript of proceedings was not before the District Court.

In short, the law as to supplementation is clear - that the Appellee herein cannot supplement this record on appeal with matters which were heretofore not before our District Court. To permit the supplementation would sanction impeaching the record which "speaks for itself."

Appellee cites Turk v. United States, 429 F 2d 1327 (8th Cir., 1970), and Gatewood v. United States, 209 F 2d 789 (D.C. Cir., 1953), for the proposition that this Court has the authority to supplement the record with matters not presented to the District Court, provided that the supplementation is in the "interests of justice."

It is apparent that the STATE OF ARIZONA is attempting to insert something in the record so that it might try to influence this Court to "second guess" the ruling made by Judge Walsh. There is absolutely no showing that the ruling by Judge Walsh would have been any different had the STATE OF ARIZONA chosen to include what it

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now attempts to insert in the record for consideration by Judge Walsh on the initial hearing. To the contrary, it is apparent that a different ruling would not have been made, since Judge Walsh obviously would have so indicated in his June 2, 1976, ruling, if a change in the ruling was in order.

GEORGE WASHINGTON, JR., submits that supplementation here would not be in the "interests of justice," would be violative of the spirit and intent of Rule 10 of the Federal Rules of Appellate Procedure, and would further "muddy the waters" with collateral and irrelevant materials.

Other parts of the record exist which neither the STATE OF ARIZONA nor GEORGE WASHINGTON, JR., felt were necessary for a proper decision to be made by Judge Walsh. At least that feeling evidently existed up until the time Judge Walsh made the decision which was adverse to the STATE OF ARIZONA.

What is plainly evident is that this Court has all the necessary "record" to render an appropriate decision. As this Court well knows, the STATE designated the Record on Appeal and now regards it as not adequately presenting the issues. There can be little question but that the STATE has had more than ample opportunity to set forth a concise yet full presentation of its argument without having to include the instant material. The STATE's Motion to include these items is tantamount to "putting everything in the record but the kitchen sink."

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In sum, WASHINGTON submits that the Motion to Supplement the Record should be denied in that the matters sought to be included are plainly not germane to this appeal.

Respectfully submitted this 8th day of July, 1976.

BOLDING, OSERAN & ZAVALA

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Attorneys for Appellant

APPENDIX D

Actually, the one thing which bothers me and which I think had an effect on Judge Buchanan that led him to change his ruling was the fact that you stated to him very frankly, "Judge, I realize if I'm wrong in getting this mistrial, this man walks, and I'm so convinced of my standing I'm willing to take that chance." He at that point, as I recall, said something to you about, "Do you realize you didn't make an objection when this statement was made?" and you agreed that you did realize that. And I think Judge Buchanan thought, "Well, I made a ruling yesterday and now the County Attorney tells me I'm wrong and he is willing to stake everything on my changing my mind," because the Judge doesn't anywhere say, that I can find, why he believes that there is manifest necessity or that it's not going to be possible for the jury to be impartial or render an impartial verdict. He doesn't make any finding. This is my problem with it.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. _____

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA

Petitioner,

-vs-

GEORGE WASHINGTON, JR.,

Respondent.

NOTICE OF APPEARANCE

The Clerk will enter my
appearance as Counsel for the
Petitioner.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By:

John R. McDonald
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STATE OF ARIZONA)
) ss.
County of Pima)

I, JOHN R. McDONALD, hereby
certify that I have served a copy of
the foregoing Reply Brief to Respondent's
Opposition to State's Petition for Writ
of Certiorari to the United States
Court of Appeals for the Ninth Circuit
upon Respondent George Washington, Jr.,
by delivering a copy of the same in the
United States Mail, with postage prepaid,
addressed to Edward P. Bolding, Esq., La
Placita Village, Suite 402 Toluca Building,
P.O. Box 70, Tucson, Arizona 85702,
attorney for Appellant, this 31 day
of March, 1977.

John R. McDonald
JOHN R. McDONALD

SUBSCRIBED AND SWORN to before me
this 31 day of March, 1977, by
JOHN R. McDONALD.

Rhonda L. Styrus
Notary Public

My commission expires:

1-9-81

IN THE SUPREME COURT OF THE UNITED STATES CLERK

No. 76-1168

STATE OF ARIZONA,
RICHARD BOYKIN, SHERIFF,
PIMA COUNTY, ARIZONA

Petitioner,

v.

GEORGE WASHINGTON, JR.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

PETITIONER'S BRIEF

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STATE OF ARIZONA,
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* * * * *

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-1168

STATE OF ARIZONA,
RICHARD BOYKIN, SHERIFF,
PIMA COUNTY, ARIZONA

Petitioner,

-vs-

GEORGE WASHINGTON, JR.,

Respondent.

NOTICE OF APPEARANCE

The Clerk will enter my appearance
as Counsel for the Petitioner.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

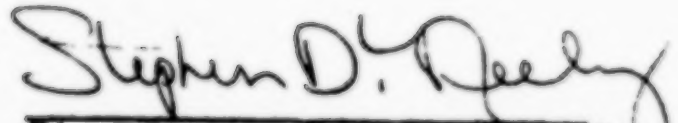

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REFERENCES IN PETITIONER'S BRIEF

For the convenience of the United States Supreme Court and the Respondent George Washington, Jr., the State of Arizona has employed the following ellipses and abbreviations in its Brief:

- (a) The Petitioner, the State of Arizona and Richard Boykin, Sheriff, will be referred to as "The State";
- (b) The Respondent, George Washington, Jr., will be referred to as "Washington";
- (c) The Honorable Alice Truman, Superior Court Judge for the County of Pima, Arizona, who granted Washington's Motion for a new trial two years following the conclusion of his first trial, and denied his Motion to Dismiss thereafter, will be referred to as "Judge Truman";
- (d) The Honorable Robert B. Buchanan, Superior Court Judge for the County of Pima, Arizona, who declared a mistrial in Washington's second trial, will be referenced as "Judge Buchanan";

- (e) The Honorable James A. Walsh, United States District Court Judge for the District of Arizona, who granted Washington's Writ of Habeas Corpus on grounds of double jeopardy, will be referenced as "Judge Walsh";
- (f) The Superior Court in and for the State of Arizona, where Washington was tried for murder will be respectfully referred to as "The Superior Court";
- (g) The United States District Court for the District of Arizona will be respectfully referred to as "the District Court";
- (h) The United States Court of Appeals for the Ninth Circuit will be respectfully referred to as "the Ninth Circuit";
- (i) The United States Supreme Court will be respectfully referred to as "the Supreme Court";
- (j) All references made to matters contained in the Appendix, as printed and lodged with this Court in accordance with U.S. Sup. Ct. Rule 36, as amended, 28 U.S.C.A., will be designated by the abbreviation "App." and the page number thereof will immediately follow;

- (k) All references made to matters contained in the certified record of the proceeding in the Ninth Circuit will be designated by the abbreviation "D.C.Rec." and the page number thereof will immediately follow;
- (l) All references made to the Superior Court Transcript of the Jury Trial of January 8, 1975, Mr. Bolding's Voir Dire of the Jury Panel, referred to in Washington's Opposition to the State's Petition for Writ of Certiorari, and in the State's Reply Brief, which Transcript was lodged with the Supreme Court on or about May 26, 1977 as an attachment to the State's Reply Brief, will be designated as Exhibit 1, and will be abbreviated to "Exh.1." and the page and line number(s) thereof will immediately follow;
- (m) The Arizona Supreme Court Memorandum Decision, filed June 20, 1974, which affirmed the decision of Judge Truman granting Washington a new trial, will be referred to as the "Memorandum Decision";

- (n) The Opinion issued on December 3, 1976, and amended January 20, 1977, by the United States Court of Appeals for the Ninth Circuit, affirming Judge Walsh's order granting Washington a Writ of Habeas Corpus, will be referred to as the "Ninth Circuit Opinion";
- (o) Unless otherwise stated, all citations and references herein will conform to the uniform system of citation.

INDEX TO ORDERS AND
OPINION OF THE COURTS BELOW

1. In the United States
District Court for the
District of Arizona,
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ing original majority
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JURISDICTIONAL STATEMENT

The United States Supreme Court has jurisdiction to decide the legal issues of this case by virtue of 28 U.S.C.A. §1254 which provides, in pertinent part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after rendition of judgment or decree....

This case was appealed by the State to the United States Court of Appeals for the Ninth Circuit, from judgment of the United States District Court for the District of Arizona, entered October 17, 1975, granting Washington a writ of habeas corpus. Judgment in the form of an opinion by the United States Court of Appeals for the Ninth Circuit was entered December 3, 1976, affirming the district court ruling. A petition for rehearing was timely filed by the State on December 17, 1976. An

order denying the petition for rehearing, but amending the original majority opinion, was entered January 20, 1977. The State of Arizona timely filed a petition for writ of certiorari with the United States Supreme Court on February 23, 1977. On April 18, 1977, the Supreme Court granted the State's petition for a writ of certiorari.

RELEVANT CONSTITUTIONAL PROVISIONS
AND ARIZONA RULES

1. U. S. Const. amend. V states that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation (emphasis added).

2. U. S. Const. amend. VI states that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence" (emphasis added).

3. 17 A.R.S. (unrevised) Rules of Criminal Procedure, rule 314, provides:

"When a new trial is granted, the new trial shall proceed in all respects as if no former trial had been had. On the new trial the defendant may be convicted

of any offense charged in the indictment or information regardless of the verdict or finding on the former trial. The former verdict or finding shall not be used or referred to in evidence or argument on the new trial."

4. 17A A.R.S. Sup. Ct. Rules, rule 48(c) provides:

"(c) Dispositions as Precedent. Memoranda decisions shall not be regarded as precedent nor cited in any court except for the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case" (emphasis added).

Udall, Arizona Law of Evidence, § 111 at 201 (1960):

"The first block of evidence ruled out is that which has no bearing on the matters in dispute in the trial, and therefore cannot aid the trier of fact."

5. Constitution of the State of Arizona, Art. 2, §23 (as amended 1972):

"The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law."

QUESTIONS PRESENTED FOR REVIEW

1. In determining whether or not a state trial judge has abused his judicial discretion in declaring a mistrial, should not the reviewing court look to the whole record of the trial, and to all the circumstances, arguments and events presented to and observed by the trial judge prior to his declaration, rather than solely to the specific findings and statements made by the trial judge in connection with his mistrial declaration?

2. When a state trial judge declares a mistrial because of the possibility of jury prejudice, and state law does not require that findings be made, is the trial judge required by the United States Constitution or by federal case law to make a specific finding of "manifest necessity" or "the ends of public justice will not be served by continuing this trial" or "the jury is no longer able to reach an impartial verdict" in order to assure that retrial will not be barred by the double jeopardy clause of the Fifth Amendment?

3. After the prosecutor has made a motion for mistrial based on jury prejudice resulting from defense counsel's opening statements to the jury, and counsel have argued to the court the possible alternatives to mistrial (such as the efficacy of admonishing the jury to disregard the statements), is the trial judge required to make a specific finding or statement as to his rejection of these alternatives, or can this rejection be implied from his granting of the mistrial?

4. When defense counsel intentionally makes prejudicial opening statements to the jury calculated to elicit an objection and motion for mistrial from the prosecutor, should not the defendant be barred from then donning the constitutional cloak of double jeopardy in defense of retrial?

STATEMENT OF FACTS

I. SUMMARY

George Washington, Jr., is currently being held in custody of the Sheriff of Pima County, Arizona to stand trial for the murder of one James Hemphill, a person shot to death during an attempted burglary on the night of December 13, 1970. Washington has stood to answer for this crime before, the first time being in May, 1971 when he was found guilty of murder in the first degree. However, in 1973 he moved for a new trial which was granted on grounds of violation of due process by the State and newly discovered evidence.

Washington was brought to trial a second time in January, 1975. In that proceeding, his counsel's opening statement to the jury contained improper and prejudicial remarks maligning the professional integrity and conduct of the prosecutor in the first trial, remarks made on authority, he told the jury, of the Arizona Supreme Court. These remarks forced the county attorney to move for a

mistrial on grounds that the jury was now prejudiced against the State. The judge listened to argument, but with some hesitation denied the request without prejudice for renewal later in the trial. Testimony from two witnesses was heard, and the evening recess taken.

The following morning the county attorney renewed his motion for mistrial. Lengthy and authoritative argument was presented by counsel for both the State and the defense. At the close of argument, and over Washington's objection, the judge declared a mistrial based on defense counsel's opening statements to the jury.

Thereafter, Washington applied to the United States District Court for a Writ of Habeas Corpus on grounds that he was being held in violation of the double jeopardy clause of the Fifth Amendment. His state remedies being exhausted, the District Court granted the Writ on the sole ground that the trial judge failed to make a finding of manifest necessity or jury prejudice in declaring the mistrial. The State ap-

pealed this decision to the United States Court of Appeals for the Ninth Circuit. On December 3, 1976, in an Opinion emphasizing that the remarks made by defense counsel were improper, the Ninth Circuit affirmed the ruling of the District Court. The State petitioned this Court for a Writ of Certiorari on February 23, 1977, and it was granted April 18, 1977.

Because this Court has consistently stated that double jeopardy issues surrounding mistrial must be evaluated in terms of the facts and circumstances of each case, and because of the explicit holding in the Ninth Circuit Opinion that "this particular record fails to reveal a 'scrupulous exercise of judicial discretion' " [App. 30], the State believes that a detailed chronology of arguments of counsel, and remarks from the trial bench, leading up to the mistrial declaration in Washington's second trial, is a necessary predicate to this Court's affirmation of the underlying contention in this Brief--that the State trial judge indeed honored the Perez edict and, with sound discretion,

took all circumstances into consideration before he declared the mistrial. The State hopes the length of the following compendium of events will not impair the import of the statements presented therein.

II. Washington's First Trial: A Brady Violation By The State

On February 11, 1971, George Washington, Jr. was charged by information with the murder of one James Hemphill, hotel night clerk for the Arizona Hotel. Prior to trial, Washington moved, inter alia, for the production of all Brady materials pursuant to Brady vs. Maryland [373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)], and the prosecution responded by denying any possession thereof. [See D.C. Rec., Volume One, pp. 35-46 for respective motion and opposition to motion.] The trial was had, and on May 21, 1971, after 10 days of testimony, Washington was convicted of murder in the first degree.

On October 20, 1971, he appealed this conviction to the Supreme Court of Arizona. 16 months later Washington moved for suspension of his pending appeal and for a new trial on grounds of newly discovered evidence. On March 20, 1973, the motion was granted and the case was remanded to the Pima County Superior Court for an evidentiary hearing on the motion for a new trial. At the hearing which was held before the Honorable Judge Alice Truman on April 30, May 1, and June 4, 1973, Washington produced evidence from which he hoped it could be inferred that evidence had been intentionally withheld from him during the first trial by the County Attorney's Office, and that the prosecutor was thereby guilty of illegal and unethical conduct. [See generally App. 37 - 76.] He also filed a Memorandum alleging, inter alia, prosecutorial misconduct. [See D.C. Rec., Superior Court Files, Case No. 18980, "Memorandum in Support of Motion For New Trial", filed May 21, 1973.] Judge Truman, who had "thought a lot about this case", and had "read the

memorandum filed by the defense"[App. 77] declined to hold there was anything deliberate in the prosecutor's non-disclosure by ruling as follows:

"...at this time I am going to grant the motion for a new trial on the grounds of violation of due process and newly discovered evidence."

[App. 6,77.]

Evidently she had found no grounds of prosecutorial misconduct associated with the evidence not disclosed to Washington, otherwise such a finding would have been stated.

III. The Supreme Court of Arizona Fails to Agree with Washington's Accusations

The State appealed this decision to the Supreme Court of Arizona. In responding, Washington again presented his contentions that the prosecutor deliberately and unethically suppressed evidence. [See D.C. Rec., Pleadings Filed

in the Supreme Court of Arizona, "Appel-lee's Answering Brief, December 21, 1973] The Court issued a Memorandum Opinion on June 20, 1974. Chief Justice Hays included in the Opinion the breadth of Wash-ington's contention:

"Defendant argues for a new trial on the ground that he was preju-diced by the deliberate suppres-sion of evidence by the State."

[App. 35 (misplaced in App.).]

This embodiment shows the Court fully understood they were presented with the question not only of the suppression of evidence by the State, but also the deliberateness of such suppression. The opinion discusses the suppression of evidence by the State--the statement of one James Hanrahan--as a violation of due process. Their opinion also discus-ses and affirms the granting of a new trial on the basis of newly discovered evidence--again, the statement of James Hanrahan. While the Court states without hesitation that the suppression of evi-dence was prejudicial to Washington, and that a new trial was warranted, the holding verifies that the Court did not

concur with Washington that the suppres-sion was the product of unethical, de-liberate, or intentional conduct by the State.

"There is no evidence more valuable to a defendant than the testimony of an eyewitness that he did not commit the crime in question. The prose-cution has an affirmative obligation to assure that a defendant receives a fair trial. The suppression of evidence was clearly prejudi-cial to the defendant and a new trial was warranted." [App. 10.]

The Supreme Court of Arizona had been asked to hold the suppression of evi-dence by the State was intentional and deliberate, but they refused. The Court went only so far as to affirm Judge Truman's ruling. [App. 7-15, 35(mispl'cd).]

On, November 13, 1974, Washington filed a motion to dismiss in the Super-ior Court contending that his Sixth Amendment Rights to a speedy trial had been violated, and that the double jeo-pardy clause prohibited his reprosecu-

tion, for a third time asserting to a court that the prosecution was guilty of willful misconduct in deliberately suppressing evidence. [See D.C. Rec., Superior Court Files, Case No. 18980, "Motion to Dismiss," filed November 13, 1974.] Judge Truman was given another opportunity to find prosecutorial misconduct, but after listening to three days of testimony she again refused to agree with Washington's assertions of intentional misconduct by the State, and on December 13, 1974, the motion was denied. [App. 16.] Washington's new trial, which he had fought so hard to obtain, was finally scheduled to begin.

IV. Washington's Second Trial Defense Counsel's Unusual Voir Dire

In the late afternoon of January 8, 1975, after a day of voir dire, the Superior Court again empanelled twelve jurors and two alternates to try George Washington, Jr., for the murder of James Hemphill. However, Washington stood already deprived of his valued Sixth Amendment right to enjoy an impartial jury of

the State. Earlier that day in voir dire of prospective jurors, Washington's own counsel, Mr. Ed Bolding, had advised the jurors that "George" had once been convicted for murdering Hemphill.

"Well, you know, nobody, I'm sure, has any doubt...that there was a previous trial in this case...There was a trial in this case, previous trial." [Exh.1,p. 22, lines 4-9, 13-16]; "...George has been to prison..." "...this guy has been to prison," [Exh.1, p. 24, lines 19-20; 25, lines 3-9; and see 25-26, lines 10-11]; "...there'll be various Deputy Sheriff's [sic] sitting up here. And what is the reason for that? Well, the reason for that is that George is in the custody of this man right now, on this charge that was filed in December of 1970, for four years, one day and eight hours...So for four years, one day and eight hours,

George Washington, Jr., has been incarcerated, in custody of the Pima County Sheriff and the Arizona State Prison on this charge, on this charge. He doesn't look too bad for that but he hasn't liked it." [Exh.1,p. 27, lines 8-21]; "Now, knowing that George has been in custody for four years and one day and eight hours so far, four years and eleven days when this trial gets through with, knowing that he's in the custody of the Sheriffs, would that influence any of you?...Would that make you think--I know what it makes me think--but would that make you think that there's any guilt attached, anybody?" [Exh.1,pp. 28-29, lines 12-1].

Interspersed between these seemingly prejudicial comments about the status of his client was a statement the subject of which was later to become the compelling

reason for Judge Buchanan to declare a mistrial. Mr. Bolding had confided to the prospective jurors,

"We think you'll hear some evidence to the fact that there was evidence hidden from George in the last trial."

[Exh.1,p. 22, lines 21-23.]

All these relevations were necessary, according to defense counsel,

"...[b]ecause of the fact that the prosecutor talked to you about the proceedings, the previous proceedings, we feel we just got to bring it on out..."

[Exh.1,p. 22, lines 10-13.]

What defense counsel was referring to was the earlier voir dire conducted by "the prosecutor", Mr. A. Bates Butler, III. Therein, Mr. Butler had asked the question-

"O.K. Anybody else? Does the fact that the alleged crime occurred almost, or excuse me, more than four years ago, does that fact and that fact alone cause you to, for one

reason or another, be unable to sit as a juror in this case?"

[App.150.]

To this, a prospective juror, a Mr. Grgich, had immediately responded, "The only thing it would do it would raise in my mind the credibility of some of the witnesses". [App.150 .] Several minutes and several questions afterward, Mr. Butler had gone back to addressing the potential problem expressed by Mr. Grgich.

"Now, as one of the individuals indicated, because its been four years since this crime occurred, they may have a problem in considering testimony because memories fade. You may also see in this case the witnesses, or many of the witnesses that have testified, or will testify before you, have testified in at least two prior proceedings because we have transcripts of what they said four years ago. We know what they said but as I say, memories fade...We're ask-

ing some people to come in here to tell you about things they saw and heard and said four years ago, so there may be some witnesses who make what lawyers call prior inconsistent statements. They said something four years ago and it may not be exactly the same today. . .are there any of you that would automatically say, "That person must be a liar'?"

[App. 151-152.]

Mr. Bolding had moved for a mistrial on this statement but it had been denied. [See App. 159-163 for arguments by counsel.]

The Court's Concern

Upon the conclusion of voir dire, the Court called certain of the jurors for individual questioning. A Mr. Elliott was called first. After posing several questions, Judge Buchanan asked,

"Mr. Elliott, do you know why there's another trial in this case? "

[Exh.1.,p. 34 , lines 17-18.]

No, he did not know, and was temporarily excused. Judge Buchanan

had a premonition of what information could yet be exposed, and gave vent to it.

"THE COURT: I was a little concerned with the poisoning of the panel, that someone might blurt out--Mr. Butler? MR. BUTLER: My only concern, Judge, would be...that is as [Mr. Bolding] has said in his voir dire, that the evidence was hidden from George, that will come out, if any of these individuals knew that the motion for a new trial was granted because the State failed to produce some evidence, if that fact would cause them to feel at this time, or that they would have some prejudice against the position of the State because of that, and I think if they had such a feeling, if they have such knowledge, that we should examine whether or not that would cause them to be prejudiced."

THE COURT: All right."

[Exh. 1, p.35, lines 9-25].

With that the court launched into an inquiry, with the help of both counsel, of each prospective juror who expressed any knowledge of the case as to whether or not he or she knew why Washington had received a second trial. With some jurors the questioning was brief, with others, quite elaborate. [See generally Exh.1, pp.33-53.] Finally, from this interrogation it was settled that not a single prospective juror knew the reason for Washington's new trial. With this done, Judge Buchanan believed he had made plain to everyone his attitude on tainted juries.

The Poisoning of the Panel

Nevertheless, the next morning, on January 9, 1975, defense counsel deprived the State of its co-existent right to an impartial jury. In his opening statement to the jurors, after many times referring to Washington's prior trial [App. 174, 175, 176-177, 181-182, 184] defense counsel told the

jury that at the first trial,

"...the prosecutor hid [statements made by one Alonzo Rodriguez] and didn't give those to the lawyer for George at that time, didn't give those statements saying the man was Spanish speaking, didn't give those statements at all, hid them. Not this prosecutor. Prosecutor who has been taken off this case " (emphasis added). [App. 180-181.]

Forging on, in evident disregard for the wishes of Judge Buchanan, Mr. Bolding "blurted out"--

"You will hear evidence that will show you that there was another eyewitness in this case....That evidence you will hear was not utilized at the last trial. You will hear that evidence was suppressed and hidden by the prosecutor in that case. You will hear that the evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that

time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case. That's what you will hear.

You will hear that through this testimony, that the wrong man was convicted. You will hear through this testimony from George that he spent four years, two days and eight hours incarcerated for something he did not do" (emphasis added). [App. 184-185.]

Moments later, defense counsel finished his damaging statement to the jury and the noon recess was declared. The County Attorney immediately approached the Judge for the purpose of making a motion regarding defense counsel's opening statement. Judge Buchanan suggested it be made after lunch, so following the recess, out of the presence of the jury, the County Attorney moved for a mistrial on the basis that defense counsel had prejudiced the minds of the jurors against the State. He argued that defense counsel had achieved

this by telling the jury that the Arizona Supreme Court granted Washington a new trial because of the purposeful misconduct of the County Attorney who had been taken off the case, statements for which defense counsel had no proof-- the Arizona Supreme Court Memorandum Opinion being inadmissible as evidence in the trial--and a statement which, regardless of its admissibility, was totally untrue. For the Arizona Supreme Court, even giving its Memorandum Opinion the broadest interpretation conceivable, chose not to so hold.

Judge Buchanan, perturbed that "[t]he whole door's been opened somehow...in the opening statement and voir dire to the jurors", demanded that defense counsel explain how the alleged hiding of evidence, and reversal of Washington's first trial, was at all material to the issue of his guilt. [App.204-5.] To defense counsel's offer of the State's "motive and bias" the prosecutor rejoined:

"...what he's trying to do, and it's obvious by his argument

about four years and two days and eight hours. What he wants that jury to do is say, 'Look, this guy has spent that long a time in prison because the prosecutor is guilty of misconduct', and so, you shouldn't find him guilty now'...The only reason he can want that in is to get the jury so mad at the State..."

[App. 206-207.]

Defense counsel argued back that it was improper for Mr. Butler "to insert the fact that there were previous proceedings in the case". The Court did not agree with that, and said so. [App. 209.] The Court further did not see

"...how the opinion of the Arizona Supreme Court in this case would be admissible on any basis whatsoever...I'm afraid, and I don't know how we stop it, we're getting to the point where we're trying the County Attorney's office and the

County Attorney's office conduct, whatever it was in the last case, and I simply, I am not going to allow it if this trial goes on and I'm very sorely tempted to grant the State's motion at this time."

[App. 209-210.]

Defense counsel, who had also promised the jury certain testimony from persons who were not then available to testify, avowed to the Court he believed he would be able to find them, and further avowed he would try to find some law supporting the admission of the Memorandum Opinion. [App. 210.] Judge Buchanan, in subtly reminding counsel of his oath of office, accepted his avowal as to the testimony to be proved, but then,

"...when we get into the area that Mr. Butler has objected to on your argument regarding misconduct of the County Attorney's

office which was [sic] approved by the Arizona Supreme Court which resulted in a prior conviction of Mr. Washington, which resulted in his having spent four years and two days and eight hours or whatever in custody, I just can't see where that's proper."

[App. 211.]

The Court wanted to give defense counsel every opportunity to proceed with this jury, and so listened to and tried to understand his arguments through questioning. [App. 194-217.] But it was not too difficult to perceive the road the defense wished to travel in this trial.

"THE COURT: I think Mr. Bolding, in essence, if what you say is correct, then the Supreme Court should have directed that the judgment of acquittal be entered in this case because the State of Arizona, through its agents, denied this man a fair trial the

first time, because the other side of the coin is, his remedy is a new trial because of the misconduct, but I don't think you're entitled to prove all this misconduct if such is the case, to impeach every witness, and I think that's what you're saying to me."

[App. 217-218.]

Nevertheless, after additional argument, the Court denied without prejudice the State's motion for mistrial. [App. 223.] Some testimony was then taken, and the evening recess declared. But the jury that went home that night was not the same jury of that morning, for they now had knowledge of the reason for the new trial. They had knowledge not only that Washington received a second trial because of a violation by the State, they were deliberately told the violation was purposeful, that the State was guilty of misconduct by hiding evidence from Washington, and that the Arizona Supreme Court had said so. Defense counsel had undone, in his opening statement, all the prior efforts to acquire a totally fair

and impartial panel of jurors. Judge Buchanan had much to weigh.

The Only Cure: Mistrial

On the morning of January 10, 1975, before the jury reconvened, the State renewed its motion for mistrial. Exhaustive argument was heard from counsel on both sides. Mr. Butler presented Arizona rules which precluded the Arizona Supreme Court Memorandum Opinion from being admitted as evidence in a trial. He argued through analogous cases that the jury had been improperly influenced. He argued that no curative instruction given by the court could adequately cure the damage done by the defense. [See App. 285, 286, 287, 290, and 291 for Mr. Butler's several arguments against alternatives to mistrial.]

He continually stressed that the position of the State had been so prejudiced by Mr. Bolding's illegal and improper argument that it was necessary to have a mistrial granted immediately, and that this conduct created a "manifest necessity" for such a declaration. [See App. 275-284 for Mr. Butler's many statements on jury prejudice and mani-

fest need.] Defense counsel countered with his objection to a mistrial declaration, commenting that the reason for the State's request was that "they see the case going down hill". [App. 264.] Mr. McDonald, defense co-counsel, argued that he didn't think the jury was "inflamed or impassioned" at the State--that there was error by the defense but it did not create a jury atmosphere that could not render the State a fair trial, given "the remedies which should be approached before mistrial such as cautionary instructions, things of that nature." [App. 264-265.]

With the State's final expression of its position--that "[defense counsel] has so prejudiced the jury that they will not be able to do what they are supposed to, and that is give a fair trial to both sides" [App. 271], Judge Buchanan was ready to rule.

"THE COURT: Based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion and its effect for the reasons for the trial, the motion for mistrial

will be granted." [App. 271-2.]

V. The District Court Proposes New Law

Thereafter, Washington brought a special action to the Supreme Court of Arizona, maintaining, inter alia, that Judge Buchanan proceeded in excess of legal authority, failed to perform duties required by law, and acted in an arbitrary and capricious manner in declaring a mistrial. The Arizona Supreme Court, without opinion, declined to accept jurisdiction of the Petition for Special Action. [App. 17.]

Next, on May 5, 1975, Washington filed a Motion to Quash the Indictment, on the grounds that Judge Buchanan's declaration of a mistrial was erroneous and without the consent of Washington. On June 16, 1975, the Superior Court denied Washington's Motion. Washington immediately filed a Petition for Writ of Habeas Corpus with the Arizona Supreme Court on the same grounds that supported the Motion to Quash. On July 15, 1975 the Arizona Supreme Court denied Washington's Petition without opinion. [App. 18.]

Washington had, on April 4, 1975,

applied to the United States District Court for the District of Arizona for a Writ of Habeas Corpus, contending he was being held in custody in violation of the United States Constitution. His state remedies finally exhausted, the District Court considered his petition. On October 2, 1975, in a hearing before Judge Walsh to show why the Writ should not issue, Judge Walsh ruled against Washington on the two issues presented in his petition that the deliberate prosecutorial suppression of Brady materials by the County Attorney prohibited further prosecution by the State, and that the calculated malicious, intentional misconduct of the County Attorney had denied Washington his right to a speedy trial. But Judge Walsh was concerned about one issue not briefed or argued by either party: Judge Buchanan had failed to make any finding on the record that there existed a manifest need for a mistrial. In colloquy with Mr. Butler, Judge Walsh insisted that Judge Buchanan was,

"Under the obligation, if he

grants it, to find that manifest necessity exists for the granting of it...the Judge doesn't anywhere say, that I can find, why he believes that there is manifest necessity or that it's not going to be possible for the jury to be impartial or render an impartial verdict. He doesn't make any finding. This is my problem with it."

[App. 129-130.]

Judge Walsh continued--

"I'm basing, really my ruling on the fact that Judge Buchanan didn't state any finding on the basis of which he granted except Mr. Bolding had made these remarks."

[App. 130.]

"I think there has to be a basis for granting a mistrial. I think anytime that the Judge grants a mistrial over the objection of the defendant, double jeopardy just raises its head prominently, whenever you do that, and I think its requisite that there be a finding of why you granted, that there is mani-

fest necessity for it, in the language of the cases, or at least that the Judge say, 'I find that it would be impossible if we went on with this trial,' no matter what we did about this impropriety of Mr. Bolding's it would be impossible for the jury to arrive at a fair and impartial verdict.'

[App. 131.]

"People usually, if they make a finding like that, express it."

[App. 137.]

As will be borne out by the following legal argument, the judges sustained on appeal usually did not express their findings.

At the conclusion of the hearing, Judge Walsh ruled:

"My finding is that the order was--I cannot find that the order was based on a finding of manifest necessity for granting the mistrial, and consequently a further trial of the defendant would be a

violation of the double jeopardy provisions." [App. 19-20,140.]

VI. The Ninth Circuit Upholds Judge Walsh

It is from Judge Walsh's ruling that the State appealed to the Ninth Circuit. That Honorable Court issued an Opinion December 3, 1976 upholding the District Court. Therein, the three judges made it clear "that the remarks made by defense counsel in his opening statement were improper" [App. 29]--"[w]hat the Supreme Court of Arizona said about the conduct of the county prosecutor has no relevance or materiality on the issue of Washington's innocence/guilt", and further supported their point of view by relying on Rule 48 of the Rules of the Supreme Court of Arizona. [App. 29, n.2.] However, the Court

"decline[d] to imply from this impropriety that the jury was completely¹ prevented from

¹The Ninth Circuit later deleted the word "completely" from their Opinion upon urging by the State in its Petition for Rehearing. [See App. 33-34, "Order", dated January 20, 1977.]

arriving at a fair and impartial verdict. If this was [sic] the case, the trial judge should have so found. He at no time, however, indicates the reason(s) why he granted the mistrial. Furthermore, his short order, quoted supra, is not susceptible to any inference that will fill this void. In the absence of any finding by the trial court or any indication that the court considered the efficacy of alternatives such as an appropriate cautionary instruction to the jury, we must conclude that neither of the tests of Perez ("manifest necessity" or "ends of public justice" has been met."

[App. 29-30.]

The Ninth Circuit had admittedly founded their Opinion upon the Jorn-ian philosophy, and had imported the Jorn holding for their decision in this case--that "this particular record fails to reveal a 'scrupulous exercise of judicial discretion,' and that more consideration should have been given to the appellee's

'valued right to have his trial completed by a particular tribunal.' " [App. 30.]

The issue raised by Judge Walsh and upheld by the Ninth Circuit is before this Court on a Writ of Certiorari to the Ninth Circuit Court of Appeals. The following legal argument opposes the holdings of the two lower federal courts that have reviewed the events in George Washington's second trial.

PREFATORY STATEMENT:
AN HISTORICAL PERSPECTIVE

In 1795, when reasons for the guarantee against double jeopardy were still fresh in men's minds, a North Carolina court refused the prosecution a second trial in order to obtain better evidence against the defendant accused of a capital offense.

"... in the reigns of the latter sovereigns of the Stuart family, a different rule prevailed: that a jury in such case might be discharged for the purpose of having better evidence against him at a future day; and this power was exercised for the benefit of the crown only; but it is a doctrine so abhorrent to every principle of safety and security that it ought not to receive the least countenance in the courts of this country." State v. Garrigues, 2 N.C. 241 (1795).

The Framers of the Bill of Rights, determined that double jeopardy would not reach these shores, drafted the Fifth Amendment's proscription against such practice: That no person would be subject for the same offense to be twice put in jeopardy of life or limb. Criminal defendants, at least in capital crimes, were to be forever protected from oppression, from efforts to secure, through the callousness of repeated prosecutions, convictions for whose justice no man could vouch.

The development of American criminal jurisprudence reflected this determination. The government, with all its resources and power, has not been allowed to make repeated attempts to convict an individual for an alleged offense, subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed. 2d 199 (1957). A prosecutor has not been allowed to circumvent an unwanted judge or jury, or to escape the consequences of damaging testimony by

precipitating a mistrial. McNeal v. Howell, 481 F.2d 1145 (5th Cir. 1973); United States v. Kin Ping Chueng, 485 F.2d 689 (5th Cir. 1973).

However, the Framers were also aware of the countervailing interest in the vindication of criminal justice, which sets outer limits to the Fifth Amendment protections for those accused of crime. If a defendant appeals his conviction and obtains a reversal, he may be retried. If a defendant requests or consents to a mistrial declaration, the government is not barred from retrial. Absent governmental oppression or harassment, the Framers did not intend the policies served by the double jeopardy provision to obscure the interests of society in preventing the guilty from going unpunished. Illinois v. Somerville,² 410 U.S. 458, 463, 93 S.Ct. 1066, 1070, 35 L.Ed. 2d 425 (1973); Smith v. State of Mississippi, 478 F.2d 88, 93 (5th Cir. 1973); Howard v. United States, 372 F.2d 294, 300 (9th Cir. 1967).

²Illinois v. Somerville will hereinafter be referred to as Somerville when appropriate.

George Washington, Jr., will ask this Court to believe his hypothesis, which he has unsuccessfully peddled in every state court in Arizona, in the United States District Court for the District of Arizona, and in the United States Court of Appeals for the Ninth Circuit, that the State of Arizona was, from the beginning, committed to convicting him by illegal and improper methods; that the prosecution maliciously, intentionally, and willfully hid, suppressed, and otherwise withheld material evidence from his defense counsel at his first trial; all in the spirit of harassment and oppression; all in contempt for the double jeopardy clause. The hypothesis is untrue.

In this criminal case there has been no intentional or deliberate suppression of evidence, nor has there been any other evidence of governmental harassment or oppression of Washington--no mistrial requested to afford the State an opportunity to gather better and more convincing evidence, no judge or jury unwanted by the State, no actions of the prosecutor or judge motivated by bad

faith, no state action intended to provoke a mistrial request or declaration. Nowhere is there an impropriety of the prosecution to magnify or add to the only burden George Washington, Jr. bears--that of being a criminal defendant in a murder case.

Instead, there is a first conviction, overturned upon motion of Washington for a Brady violation by the State; there is a second trial wherein defense counsel told the jurors in voir dire that Washington had once been convicted for this murder; who then advised them, in his opening statement, that the Supreme Court of Arizona had ruled the prosecutor was guilty of misconduct by willfully withholding evidence in the first trial, and that Washington was granted a second trial because of this misconduct. Instead of bad faith on the part of the prosecution, there is seeming bad faith by the defense--for not only had the Supreme Court of Arizona refused to hold the suppression of evidence by the State was a willful, deliberate act, so had Judge Truman in the Superior Court of Arizona for the County

of Pima, after two hearings and five days of testimony on the subject. Next, there is a demand by the State for a mistrial based on the prejudicial effect of defense counsel's statements, and, after lengthy argument by counsel over a two-day period, a mistrial declaration. Manifestly, there is no practice by the State that would have caused the Framers to proclaim a violation of the double jeopardy clause.

Therefore, cannot the State retry Washington for the murder of James Hemphill?

The United States District Court has initially answered this question by granting Washington, on October 2, 1975, a Writ of Habeas Corpus for a violation of the double jeopardy clause. [App.19.]

However, that Court did not grant the Writ upon any traditional consideration of abuse of judicial discretion. In the durable language of United States v. Perez, 9 Wheat 579, 6 L.Ed. 165 (1824), the analysis has usually been couched in terms of manifest necessity, and whether the trial record reveals indications of its existence. If manifest necessity

could reasonably be found to exist therefrom, the trial judge did not abuse his discretion in declaring a mistrial. Illinois v. Somerville, U.S. at 459, 35 L.Ed.2d at 428. This amorphous and often ambiguous phrase of manifest necessity has historically included the inability of a juror to agree upon a verdict [Perez], the bias or prejudice of a juror [Simmons v. United States,³ 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891)], the exigencies of war-time tactics, [Wade v. Hunter,⁴ 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949)], and the inevitability of a verdict overturned on appeal [Somerville]. And always, it has excluded governmental harassment and oppression of the accused. If such exists, manifest necessity does not.

Neither did the District Court grant the Writ based upon any such harangue of State oppression and harass-

³Simmons v. United States will hereinafter be referred to as Simmons when appropriate.

⁴Wade v. Hunter will hereinafter be referred to as Wade when appropriate.

ment. Although in his Petition to that Court, Washington nineteen times accused the State of deliberately and intentionally withholding evidence prior, during and subsequent to his first trial [See D.C. Rec., Volume One, pp 7-34], and in argument his counsel over a dozen times proposed by various assertions that the County Attorney's office was committed to illegally securing Washington's conviction in any possible manner [see App. 83-126], this was all rejected by Judge Walsh. [App.126-7,141.]

Judge Walsh granted Washington his freedom for an entirely different reason: The trial judge had failed to articulate a finding of manifest necessity or jury prejudice when he declared the mistrial in Washington's second trial. [App. 19-20, 140.]

While it has been unchallenged law for 150 years that, in the absence of consent by a criminal defendant, there must exist a manifest and imperious need for a mistrial before that defendant can be retried for the same offense, never in the history of federal jurisprudence, until the ruling of Judge

Walsh, has a reviewing court demanded statements of findings by a trial judge that there existed a manifest need for a mistrial.

This Court must be the final arbiter of this isolated issue raised by Judge Walsh. His decision, if upheld, will add a mechanical dimension to the otherwise fluid concepts of manifest necessity. The Ninth Circuit has held, as did Judge Walsh, that the statements made by defense counsel were improper, but that the trial judge should have stated, if he so found, that they were prejudicial and therefore created a manifest need for a mistrial. The State believes its first three questions presented for review [supra at page 13], all stemming from the issue raised by Judge Walsh, have never been answered by any federal court. The following argument attempts, by way of historical analysis, to answer those questions and thereby refute Judge Walsh's technical contention that a trial judge must make findings of manifest necessity when declaring a mistrial. Since the first three questions form one tripartite issue, they will be analyzed as a whole.

The fourth question, presenting the issue of defense misconduct precipitating a mistrial, will be analyzed separately.

LEGAL ARGUMENT

I. SUMMARY of the State's Position

... The permissibility of reprosecution after mistrial was first considered by this Court in 1824. Justice Story decided in Perez that the discharge of a "hung" jury in a capital case did not bar further proceedings:

"We think that, in all cases of this nature, the law has invested courts of Justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circum-

stances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office."

9 Wheat at 580, 6 L.Ed. at 166.

Although the course of mistrial adjudication since Perez has provided little clarification for the touchstone term of "manifest necessity", in the unbroken line of decisions following Justice Story's mandate, not one federal (or state) court has ever held, expressly or by implication, that in order for reprosecution to be allowed after a mistrial declared over defendant's ob-

jection, a trial judge must verbalize a finding of manifest or urgent necessity or some other legal reason consistent with his discretionary opinion that the mistrial was prompted by manifest necessity. Diligent research has failed to uncover a single prop to support Judge Walsh's ruling. There is no corollary mandate in Perez that courts of justice state their opinion there is a manifest necessity for a mistrial--only that they be of the opinion that it exists.

Likewise, Perez contains no corollary mandate that there must be indicated upon the record the trial judge's consideration of alternatives to mistrial, such as was decided by the Ninth Circuit. Justice Story admonished trial judges to take all circumstances into consideration, but nowhere does he tell judges to indicate on the record their consideration of these circumstances. Both the District Court and Ninth Circuit holdings can be likened to "a rigid, mechanical rule which [this] Court has eschewed since the seminal decision in Perez."

Somerville, 410 U.S. at 463, 93 S.Ct. at 1070.

150 years of Supreme Court determinations on mistrial rulings have not altered these principles. Mr. Justice Rehnquist, in delivering the opinion in Somerville, did not hold that the mistrial therein met the manifest necessity requirement because the trial court did conclude the ends of public justice would be defeated--he held that manifest necessity existed because the trial court could have concluded the ends of public justice would be defeated. Id., U.S. at 459, 93 S.Ct. at 1065.

A voyage through the cases decided subsequent to Perez discloses a uniform underscoring by the reviewing courts of the trial judge's discretionary judgment, and while any abuse must be judged in the context of the facts presented, this discretion is never confined by formula or precise rule. A survey of these holdings serves to justify that the following statement of the State's position has been true to the extent of a unifying principle:

"That the trial judge need not articulate his findings of manifest or other urgent necessity in declaring a mistrial.

If an appellate court, after reviewing the trial record, can find that the judge could reasonably have been of the opinion that a manifest need existed to declare a mistrial, and that he took all circumstances into account, such declaration will not be an abuse of discretion, and will not bar subsequent reprosecution for the same offense. That in taking all circumstances into account, the trial judge need not articulate these circumstances, nor his rejection of alternatives to mistrial if they were presented to him in argument by opposing counsel.

II. DISCUSSION

The Early Progeny of Perez

One of the first cases to depend upon Justice Story's pronouncement of judicial discretion was Simmons v. Uni-

ted States.

Therein, defense counsel had published prejudicial information in a local newspaper which the jurors had read. The district attorney moved to withdraw a juror because ". . .there is a manifest necessity for the act." Simmons v. United States, supra 142 U.S. at 149 . The opinion as reported reveals no canvassing of alternatives prior to the mistrial declaration. The jurors were not admonished to disregard what they had read, or asked whether or not they could still decide the case impartially. Apparently, once the judge determined the information had reached their minds, a mistrial was the only solution.

The trial judge in this early case fully articulated his opinion that the jury had become biased against the prosecution, but on review, Mr. Justice Gray was not looking for such articulation. He was looking in the record for justification of the trial judge's opinion.

"It needs no argument to prove that the judge, upon receiving such information, was fully

justified in concluding that such a publication. . .made it impossible for that jury, in considering the case, to act with the independence and freedom on the part of each juror requisite to a fair trial of the issue between the parties."

142 U.S. at 154-155.

The trial judge was fully justified in his conclusion, so held the Supreme Court. Notably, there was no reliance upon trial court findings for this justification. Query what Mr. Justice Gray would have held had the record contained evidence that the trial judge was not justified in his conclusion. Would the findings made by the trial judge have nonetheless "settled it" for the Justice? [See App. 133, where findings of jury prejudice would have "settled it" for Judge Walsh.] Would he have thereby declined to probe the record for any abuse of discretion? Plainly, the State submits not, and that trial court findings in a mistrial situation are, and

have been, transparent to the reviewing court's observance of discretion.

It is interesting to note that Justice Gray thought it important to also include in his opinion of some 85 years past a principle about which the State has been reminding courts since Mr. Bolding's prejudicial remarks to the jury on January 9, 1975:

" 'It is an entire mistake to confound this discretionary authority of the court to protect one part of the tribunal from corruption or prejudice with the right of challenge allowed to a party; and it is, at least, equally a mistake to suppose that, in a court of justice, either party can have a vested right to a corrupt or prejudiced juror, who is not fit to sit in judgment in the case.' " [quoting from Mr. Justice Curtis' Opinion in United States v. Morris, 1 Curt. 23, 37] (emphasis added). Id., U.S. at 154 .

The exact same argument was made

by Mr. Butler before Judge Buchanan declared the mistrial.⁵

One year after Simmons, the Supreme Court decided Logan v. United States,⁶ 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892). There, a jury, empanelled to decide the guilt or innocence of three alleged murderers, acquitted one after forty hours of deliberation

⁵It is difficult to reconcile the Ninth Circuit's holding, that the judge's mistrial order was "not susceptible to any inference" of the reasons therefor [App. 30], with the State's by-then repeated argument that Mr. Bolding "has so prejudiced that jury that they will not be able to do what they are supposed to do, and that is give a fair trial to both sides" [App. 271], especially when that statement immediately preceded the judge's ruling. It defies reasoning to hold that Judge Buchanan did not have jury prejudice on his mind when he declared a mistrial.

⁶This case will hereinafter be referred to as Logan when appropriate.

but could not agree as to the other two. The trial court made no findings. It simply "approved" the verdict, and ordered it to be recorded", and further ordered that the unacquitted defendants be "committed to the custody of the marshall until further order". Logan, 144 U.S. at 269, 12 S.Ct. at 619. The two defendants filed a special plea alleging that they had once been in jeopardy from the same offense. Justice Gray deferred to the trial judge's discretion, not the least troubled by the obvious absence in the record of any statements made by the trial judge confirming that he had found manifest necessity for discharging the jury. Instead, he reviewed the circumstances of the case.

"Upon these facts, whether the discharge of the jury was manifestly necessary in order to prevent a defeat of the ends of public justice, was a question to be finally decided by the presiding judge in the sound exercise of his discretion" (emphasis added). 144 U.S. at 298, 12 S.Ct. at 628.

Thompson v. United States,⁷ 155 U.S. 271, 15 S.Ct. 73, 39 L.Ed. 146 (1894), followed closely on the heels of Simmons and Logan and reflected the Supreme Court's by-then avowed reticence to tamper with a trial judge's mistrial decision--irrespective of any findings made on the record--when that record revealed a manifest necessity for the act. Mr. Justice Shiras begins his opinion of the court by espousing their practice:

"The record discloses. . .the fact that one of the jury was disqualified by having been a member of the grand jury that found the indictment became known to the court."

155 U.S. at 73.

In the opinion, the Justice gives the facts of the case; that

"the judge stated that it had come to his knowledge that one of the jurors was disqualified to sit on account of having been a member of the grand

⁷This case will hereinafter be referred to as Thompson when appropriate.

jury that returned the indictment in the case..."

Id.

While this statement of the trial judge clarifies his reason for discharging the jury, no mention is made by the Court of their reliance on this statement. The Court, however, states what it did rely upon: the holdings of Perez, Simmons and Logan, respecting the exercise of judicial discretion.

Keerl v. State of Montana, 213 U.S. 135, 29 S.Ct. 469, 53 L.Ed. 734 (1909), once again found the Supreme Court traversing the record to determine whether or not the trial judge abused his discretion in discharging a hung jury. The record revealed a very clear finding by the trial court: ". . .whereupon it satisfactorily appearing to the court that there is a reasonable probability that the jury cannot agree". Id., 213 U.S. at , 29 S.Ct. at 469. But that finding was not enough. Mr. Justice Brewer looked into the record itself before affirming that the lower court was justified in the jury discharge.

"The record shows that the jury

were kept out at least twenty-four hours, and probably more . . ." (emphasis added).

Id., 213 U.S. at 130, 29 S.Ct. at 470.

It is safe to infer from this opinion that if Justice Brewer had not found sufficient justification in the record for the jury's discharge, any self-serving findings made by the trial judge would have carried no more weight than a feather on a scale.

The noted Judge Learned Hand also had occasion to pass on the issue of findings made by a trial judge in a mistrial circumstance, and ruled, along with his two judicial brethren Swan and Clark, that there was no necessity therefor. In United States v. Potash, 118 F.2d 54 (2nd Cir. 1941), appellants' trial had ended in a mistrial after the jury had been discharged. On appeal, they argued that "a plea of double jeopardy must be sustained unless the reason for discharging the jury before verdict is entered upon the record" (emphasis added). 118 F.2d at 55. The record read "at 12:45 P.M. the jury is discharged and mistrial ordered". The trial tran-

script disclosed that only eleven jurors had returned after a lunch break, and that the trial judge stated "under the circumstances" the only thing he could do was discharge the jury. Id. The Circuit Court, noting "the appellants have found no federal authority supporting their technical contention" (emphasis added) [id.], admonished:

"in the federal courts the recognized rule is that discharging a jury before a verdict is a matter within the sound discretion of the trial court. [Citations omitted.] Granting that the exercise of such discretion may be reversed in a case of abuse, the burden should be on the appellant to show abuse. A defendant who pleads double jeopardy has the burden of proving his plea" (emphasis added).

118 F.2d at 56.

In comparing Potash to the case at bar, not only did the Potash trial judge fail to declare manifest need for a mistrial, he did not even verbalize a reason for discharging the jury. Yet,

the reviewing court overruled a plea of former jeopardy because it could infer from the record that one of the jurors had become incapacitated. 118 F.2d at 55. Judge Buchanan did more than the Potash trial judge who was upheld by the Second Circuit. Judge Buchanan peppered the trial record with verbal indications that he was not predisposed to trying the guilt of the County Attorney's office along with Washington [see App. 204-205, 209-210, 211, 212, 217-218], and while he did not specifically articulate a finding of manifest need, he gave a solid reason for declaring a mistrial--the "effect" of defense counsel's opening statement (which statement was directed solely to the jury) "concerning the Arizona Supreme Court opinion." [App. 271-272.]⁸ As in Potash "the

⁸The Ninth Circuit has stated in their opinion that Judge Buchanan did not at any time indicate his reasons for granting the mistrial. [App. 30.] It is again difficult to reconcile that Court's point of view with the actual facts of the case that were before it.

inference is obvious" (118 F.2d at 55) from a reading of the entire trial court record that Judge Buchanan could have believed the jury had become less and less impartial since the outset of the proceedings and that defense counsel's accusatory statements had done permanent damage to the "edifice of justice" so that it was possible, in fact probable, that it no longer stood symmetrical to both sides. Palko v. Connecticut, 302 U.S. 319, 328, 58 S.Ct. 149, 156, 82 L.Ed. 288 (1937).

The case of Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949), reh. denied, 337 U.S. 921, 69 S.Ct. 1152, 93 L.Ed. 1730 (1949), saw the Supreme Court apply civil interpretations of the Fifth Amendment to military court proceedings. Soldier Wade was charged with rape, and the military trial court, needing to consider testimony of two additional witnesses, continued the trial. Subsequently, charges were withdrawn, and the case was transferred to another infantry division. The only verbalized reason for this transfer can be found in a communication from Headquarters to the Commanding General

that "[d]ue to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time." Hunter v. Wade, 72 F.Supp. 755, 759 n. 3 (1947). The case was transferred again with a similar communication that "[i]t was impracticable to try this case. . . at this headquarters at this time in view of the tactical situation and fact that the location. . . of necessary civilian witnesses are a considerable distance without the boundaries of this command". Id., n.4.

The federal district court held that this was not the kind of "imperious" or "urgent necessity" that came within the recognized exception to the double jeopardy provision. On appeal, the Tenth Circuit reversed, one judge dissenting. That Court speculated on the reasons for transferring the case, only to emphasize the absurdity of attempting to second-guess the Commanding General's decision (who was analogized to a judge in a civilian court).

"Distance of the persons from the then situs of the court was one element entering into

the situation. Perhaps other essential elements inhered in it. . . On the other hand, it may be that distance or emergencies growing out of the prosecution of the war did not make it impossible or unreasonably difficult to produce the witnesses before the court and obtain their testimony. It may be that the case should have remained with the court instead of being withdrawn. But that was a matter to be determined by the Commanding General in the exercise of his sound discretion; and, taking into consideration the conditions and circumstances presenting themselves, he determined in the exercise of such discretion that the tactical situation made it necessary or advisable to withdraw the case from the court-martial and to refer it to the Commanding General of the Third Army for trial before another court-martial" (emphasis added).

Hunter v. Wade, 169 F. 2d 973,
976 (10th Cir. 1948).

On Writ of Certiorari, the Supreme Court held for the government in an elaborate explanation, part of which follows:

"The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just

judgments. When justice requires that a particular trial be discontinued is a question that should be decided by persons conversant with factors relevant to the determination."

336 U.S. at 688-689, 69 S.Ct.
at 837

The Supreme Court reminded trial judges

"to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. The value of the Perez principles thus lies in their capacity for informed application under widely different circumstances, without injury to defendants or to the public interest."

336 U.S. at 691, 69 S.Ct. at 838.

The Commanding General had given their reasons for transferring Wade's charges. But as clearly articulated by the Tenth Circuit, it did not matter what the reasons were, so long as there appeared to the Commanding Generals an urgent need. And whether or not there so appeared an urgent need to these men was

not answered by any statements made in the record. It was answered, for the Supreme Court and Tenth Circuit, by the record itself. This war-time Supreme Court, as some would call it, did nothing different than any Supreme Court before it--it looked solely to the record for manifest need.

"...this record is sufficient to show that the tactical situation brought about by a rapidly advancing army was responsible for withdrawal of the charges from the first court-martial. . . There is no intimation in the record that the tactical situation did not require the transfer order."

Id.

In likely comparison, Judge Buchanan very plainly stated his reason for declaring a mistrial--"defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion and its effect for the reasons for the new trial." [App.271.] But the articulated reasons form only a guide for the reviewing court to follow. To borrow the logic of the Tenth Circuit:

The "effect" of Mr. Bolding's statements on the jury was one element entering into Judge Buchanan's decision. Perhaps the seriousness of the evidentiary impropriety attaching to several of his remarks also inhered in it. Perhaps the constant harping by Mr. Bolding on Washington's prior conviction also entered into it. On the other hand, it may be that the prejudicial impact on the jury from all the statements did not create such a manifest need to declare a mistrial. It may be that the error could have been corrected by a cautionary instruction. But that was a matter to be determined by the trial judge in the exercise of his sound discretion. And whether or not he exercised his sound discretion is not to be determined from his findings and statements, or lack thereof. Whether or not he considered alternatives to mistrial is not to be determined by his statements that he did so. The record itself is the only indicator, for findings cannot control the effect of the facts.

To now borrow the logic of the Wade Supreme Court, the record before this Court is sufficient to show that the statements made by Mr. Bolding were responsible for Judge Buchanan's act, and there is no intimation in the record that those state-

ments did not require the declaration. The State argues that Judge Buchanan, sitting in the midst of this trial environment, listening to Mr. Bolding's voir dire and opening statement, observing the jurors' attentiveness thereto, and always responsive to arguments of counsel, which several times included alternatives to mistrial, could reasonably have found a manifest need for declaring a mistrial.

This Court has time after time propounded, that if a review of the record shows the trial judge could have found manifest necessity, his mistrial ruling will not be disturbed. Judge Walsh did not analyze the trial court record to determine if Judge Buchanan could have found manifest necessity from all that had transpired in his courtroom. He wanted assurance, through statements in the record, that it was found. Judge Walsh did not allow Judge Buchanan to testify that he was of the opinion there was manifest necessity for the mistrial. [See App. 143-147 for motion to re-open evidence on affidavit of this opinion]. To Judge Walsh, if this opinion, held or not, there was no

justification for the mistrial. Judge Walsh's formula boils down to one simple equation:

NO FINDINGS = NO MANIFEST NECESSITY.

No more mechanical evaluation of the proscription against double jeopardy in a mistrial circumstance could possibly exist.

A Case Misconstrued

In 1961, the Supreme Court decided the case of Gori v. United States.⁹ 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed. 2d 901, (1961), reh. denied, 368 U.S. 570, 82 S.Ct. 25, 7 L.Ed. 2d 70 (1961). Therein, the Court was asked to pass upon the action of an "overassiduous" trial judge who sua sponte declared a mistrial, apparently to forestall a line of questioning he thought was intended to disclose the accused's other crimes. The Supreme Court relied heavily on the review of discretion made by the Court of Appeals which had affirmed the trial court's ruling. Also, the Supreme Court

⁹This case will hereinafter be referred to as Gori when appropriate.

interpreted the Court of Appeals' decision as one based upon an analysis of the trial judge's extreme solicitude for the defendant.

"...[i]t was unclear what reasons caused the court to take this action. . . In any event, it is obvious, as the Court of Appeals concluded, that the judge 'was acting according to his convictions in protecting the rights of the accused.' " Id., 367 U.S. at 366-367, 81 S.Ct. at 1524-1525.

Consequently, later Supreme Court and Circuit Court decisions assessed the Cori decision as a possible "variation on the [Perez] theme according to a determination by the appellate court as to which party to the case was the beneficiary of the mistrial ruling." United States v. Jorn,¹⁰ 400 U.S. 470, 91 S.Ct. 547, 555, 27 L.Ed. 2d 543 (1971); Downum v. United States.¹¹ 372

¹⁰This case will hereinafter be referred to as Jorn when appropriate.

¹¹This case will hereinafter be referred to as Downum when appropriate.

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U.S. 734, 736, 83 S.Ct. 1033, 1034, L.Ed. 2d 100 (1963) United States v. Smith, 390 F.2d 420 (4th Cir. 1968); United States v. Glover, 506 F.2d 291, 296 (2nd Cir. 1974). The State respectfully submits that the Gori Supreme Court's interpretation of the Second Circuit's Opinion was misplaced, and that Gori was actually affirmed by the Circuit Court upon a traditional analysis of Fifth Amendment precepts.

The judges of the Second Circuit were of the collective opinion that this case "presented a general problem important to the administration of justice in the circuit" [United States v. Gori, 282 F.2d 43, 44 (1960)], and thereupon voted upon its disposition en banc. The opinion lays out portions of the transcript showing how the "Assistant United States Attorney attempted to prove this fairly simple case" by testimony of several witnesses, and how he "ran into repeated difficulty, however, in part because of continuous formal objection by the defense, but even more by interference on the part of the trial judge, who repeatedly ordered the reframing of questions and otherwise took the conduct of the

case away from him." 282 F.2d at 45, n.3. The eventual mistrial declaration by the trial judge, "because of the conduct of the district attorney" [Id.], was also set forth in the opinion, and for this Court's interest is repeated below.¹²

¹²"The Court: If you ask one more question that alludes to suspicion, I will withdraw a juror and put this case over to January of next year. Now, I want this crime proved, not nine others.

Mr. Passalacqua: I am not referring--

The Court: That is exactly what you are going to lead this jury to believe. These agents are helpless. They have got to-- Juror No. 1, step out. I declare a mistrial and I don't care whether the action is dismissed or not. I declare a mistrial because of the conduct of the district attorney.

Mr. Passalacqua: I am not--

The Court: You heard me. I don't want any more District Attorneys coming down here telling me how I am going to try the cases. And tell your chief if he doesn't want to put any more cases on before me, it is all right with me. That's all."

Id.

The Second Circuit did not agree with the trial judge that the conduct of the district attorney was improper. [Id., at 46, 48, and 51]. Nonetheless, the Court affirmed the declaration of a mistrial as within his discretion, but took great pains to explain their rationale, a part of which follows:

"The colloquy set forth in the margin demonstrates that the prosecutor did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions."

Id., at 46.

The reviewing court did no more than analyze the facts before them in the framework of governmental harassment and oppression. Finding none, there was no reason for the government to be barred from retrying the defendant. While the Court acknowledged that the trial judge declared the mistrial to protect the defendant's rights, their ruling was based on a subtle but imperative distinction--that the defendant was not prejudiced by retrial. His "protected

rights" were ancillary to the crux of the holding:

"On this basis we do not believe decision should be difficult, for the responsibility and discretion exercised by the judges below seem to us sound. Here the defendant was in no way harmed by the brief trial which, indeed, revealed to him the prosecution's entire case. He was thus in a position to start anew with a clean slate, with all possibility of prejudice eliminated and with foreknowledge of the case against him. The situation was quite unlike the more troublesome problems found in various of the cases, as where the prosecution desires to strengthen his case on a new start or otherwise provokes the declaration of mistrial, or the court has acted to the prejudice of the accused, or the accused has actually been subject to two trials for es-

sententially the same offense."

Id., at 48.

The foregoing anatomy of the Gori decision, which the State believes to be the correct one, is easily overlaid upon the case presently before this Court. In Gori, as in Washington's second trial, there were no findings or statements of some manifest need made by the trial judge. The Courts reviewing the Gori trial, judging from the opinions, weren't looking for any.¹³ The Second Circuit was interested in whether there was indicia of government oppression in the record, and whether the defendant would be subjected to preju-

¹³It is important to recall that the Second Circuit didn't even agree with the trial judge that the district attorney acted improperly. Therefore this stated reason by the judge for the mistrial declaration could have had no influence upon their holding that there existed a manifest necessity for the act.

dice by retrial.¹⁴ The judges found none of the historical indicators in the trial record; thus, jeopardy did not attach.

¹⁴The Supreme Court later seems to acknowledge this reasoning as the key to Gori. In Downum, 372 U.S. at 736, 83 S.Ct. at 1034, Gori is cited as authority for the principle that "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches, inferring if not clearly expressing that jeopardy did not attach in Gori because harassment had not been found. And in Jorn Mr. Justice Harlan sharply criticized the Supreme Court's Opinion in Gori, in which he had joined, and explicitly rejected any limitation on review based upon the intended beneficiary of the mistrial. Id., 400 U.S. at 483.

See also United States v. Beasley, 479 F.2d 1124, 1126 (5th Cir. 1973) for this same acknowledgment.

In looking at the record of Washington's second trial, neither will this Court find any indication of government oppression; on the contrary, it should be hard to conclude that Washington was at all harmed by the brief trial. He has had, since January 10, 1975, an opportunity to begin anew "with all possibility of prejudice eliminated and with foreknowledge of the case against him". Id. The State is requesting the same conclusion that was reached in Gori by the Second Circuit for the case at bar.

"Unlimited, Uncertain, and Arbitrary Judicial Discretion"¹⁵

In the early cases following Perez, the language of "caution" and "necessity" drew far less attention than Perez's repeated references to "discre-

¹⁵This is the closing passage in Downum [372 U.S. at 738, 83 S.Ct. at 1035-1036], describing what the Supreme Court there refused to sanction. The phrase can be equally associated with the behavior of the Jorn trial judge.

tion". Up to this point, Perez had been continually cited as a case narrowly limiting the power of appellate courts to question a trial judge's mistrial order. Gori is the penultimate example of this limitation. But there came a time when the language of "manifest necessity" and the warning that the power to declare mistrials "ought to be used with the greatest caution, and under urgent circumstances" was brought to bear by the Supreme Court. In ostensible radical transformation of the jurisprudence of mistrials, the Court decided Downum v. United States and United States v. Jorn.

In the District of Western Texas, in April of 1961, a jury had been sworn and trial was about to begin for one Raymond Downum, a man charged with stealing from the mail and forging and uttering checks so stolen. The government was told to proceed with its case, but instead of calling his first witness, the prosecutor asked that the jury be discharged because its key witness for two of the seven counts charged had not been served with subpoena. The jury was discharged, a new trial was had, and

conviction resulted over a plea of double jeopardy. On appeal, the Fifth Circuit affirmed. Downum v. United States, 300 F.2d 137 (5th Cir. 1962). On Writ of Certiorari, the Supreme Court did not. The Court recognized this situation as one where the district attorney entered upon the trial of the case without sufficient evidence to convict; a prime exemplar of the Framers' fears. As later pegged by the Ninth Circuit in Oelke v. United States, 389 F.2d 668, 672 (9th Cir. 1967), the reason why double jeopardy attached to Downum was "the possibility of the unjustified harassment of citizens due to the whims of the prosecuting officer." The Supreme Court, faithfully watching for violations of our Constitution, had clearly found one in the successive trials of Raymond Downum.

This was the first circumstance of mistrial the Supreme Court did not uphold. Realizing they were treading uncharted waters, the groundwork for this decision was carefully laid out by the Court in its opinion. Cornero v. United States, 48 F.2d 69 (9th Cir.

1931), was quoted at length. Also, United States v. Watson, 28 Fed.Cas. 499 and United States v. Shoemaker, 27 Fed.Cas. 1067 were relied upon. These relied-upon cases made clear their complete reliance upon the record for indications or absence of manifest necessity. For example, in Watson, that court reasoned:

"The mere illness of the district attorney, or the mere absence of witnesses for the prosecution, under the circumstances disclosed by the record in this case, is no grounds upon which, in the exercise of a sound discretion, a court can, on the trial of an indictment, properly discharge a jury. . . . To admit the propriety of the exercise of the discretion on such grounds would be to throw open the door for the indulgence of caprice and partiality by the court, to the possible and probable prejudice of the defendants. When the trial of an indictment has been commenced

by the swearing of the jury, the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is, for any reason, not made out against him, unless he consents to the discharging of the jury without giving a verdict, or unless there is such a legal necessity for discharging them as would, if spread on the record, enable a court of error to say that the discharge was proper." [28 Fed.Cas. at 500-501]

Downum, 372 U.S. at 738, n.1, 83 S.Ct. at 1035, n.1.

The Watson Court had not stated, as Judge Walsh would have it, ". . . unless there is such a legal necessity for discharging them as would, if stated, enable a court of error to say the discharge was proper." The Watson court looked for legal necessity spread on the record. All it found was a prosecutor, waiting for a better day to convict. The Downum Court, relying thereon, cited many

cases where manifest necessity was held to exist, and looked to the record before it for any similarities. Instead, all the Court found was a prosecutor, again, waiting for more evidence to convict.

The State does not argue that Judge Walsh did not look at the record of Washington's second trial. He "examined it and studied it and renewed the examination" before the hearing on October 2, 1975. [App.126.] But his examination was misguided. He was not looking for events from which Judge Buchanan could reasonably have found manifest necessity for the mistrial declaration. He was looking for findings. . . words. . . some statement to confirm that Judge Buchanan felt manifest necessity existed in that trial.

" . . . if he said, 'There is absolutely no way that I think we can undo this to the extent that an impartial verdict would be a possibility.' this would settle it for me. But I can't find it."

[App.133.]

" . . . how can I or anybody

else say that Judge Buchanan found manifest necessity, when it would take fifteen words or twenty words to say it and he didn't say it?"

App.133-138.]

Mr. Butler correctly argued to the District Court that "no case says that a Judge has to use the magic words of 'manifest necessity'. I think what they have to find is that record supports that manifest necessity was dictated. . .". [App.138.] Judge Walsh replied, then you would get the ruling "from somebody who looks at the record and says, 'Well, I think it would have supported this, and I make the finding'. . .I can't do it." [App.138-9.] The cases say without exception that he could have.

1971 saw the Supreme Court grapple with a mistrial, declared by a judge who was at best erratic in his trial decision. The trial judge in United States v. Jorn in a total abdication of his responsibility to exercise sound discretion, abruptly aborted the proceedings prior to verdict on the belief that certain witnesses, who were to testify in a tax fraud case, had

not been sufficiently warned of their constitutional rights. The trial judge, giving no "reason", had stated:

"So this case is vacated, setting is vacated this afternoon, and it will be calendared again; and, before it is calendared again, I am going to have these witnesses in and talk to them again before I will permit them to testify."

400 U.S. at 489, 91 S.Ct. at 559, note 1.

In declaring there was no manifest need to declare a mistrial, the Supreme Court listed the trial circumstances that were of paramount importance to their holding, and the lack of an express finding of some manifest necessity found by the trial judge was not one of them.

". . .the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so.

When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account there was a manifest necessity for the sua sponte declaration of this mistrial. . . Therefore, we must conclude that in the circumstances of this case, appellee's reprosecution would violate the double jeopardy provision of the Fifth Amendment." 400 U.S. at 487, 91 S.Ct. at 558.

It is this case, this set of circumstances, that the Ninth Circuit, in spite of forewarning by the Somerville Supreme Court, has chosen to equate with those surrounding Washington's second trial. In Somerville, this Court refused to rely on its holding in Jorn and cautioned other courts from doing the same, unless the facts of the case before them equated with those in Jorn.

"While it is possible to excise various portions of the plurality opinion to support the result reached below [447 F.2d 733], divorcing the language from the facts of the case serves only to distort its holding." 410 U.S. at 469.

The Ninth Circuit did nothing if not excise portions of the Jorn opinion and apply them to the facts surrounding Judge Buchanan's mistrial ruling, evidently failing to discern that the exercise of judicial discretion in Jorn differed substantially from the instant case. Presented here is no abrupt discharge, no absence of opportunity for counsel to object, no absence of suggested alternatives to mistrial: the State argues, in essence, no failure to exercise sound discretion.

From a reading of the Ninth Circuit Opinion, the judge did not consider the fact that defense counsel's conduct occasioned the mistrial declaration. Of unescapable importance in the case at bar, it was Mr. Bolding who told the jury that there was a prior trial, and

that Washinton had once been convicted for the crime of killing James Hemphill. It was Mr. Bolding who told the jury the prosecutor in the first trial had been taken off the case for misconduct,¹⁶ and that the Arizona Supreme Court had granted a new trial because of willful hiding of certain evidence in the prior trial by that prosecutor. While it may at times be difficult for a judge to distinguish excessive zeal from intentional precipitation of mistrial, here the anomaly must give way to defense counsel know-

¹⁶Mr. Jon R. (Ric) Cooper, the County Attorney trying the case in the first trial, was not "taken off the case" for misconduct. As Mr. Butler argued to Judge Buchanan, and as Mr. Bolding was aware, Mr. Cooper was not trying the case the second time, in 1975, because the County Attorney's office suspected there was a likely possibility that he would be called as a witness, if Mr. Butler were allowed to delve into the wiring of Hanrahan as impeachment, or to show motive or on some other evidentiary basis. [See App. 201 -202 for Mr. Butler's argument.]

ingly (or should have known he was bringing about the mistrial ruling.

In this context, a pertinent paragraph from the Jorn majority seems to have been lost upon the Ninth Circuit.

"The conscious refusal of this Court to channel the exercise of that discretion according to rules based on categories of circumstances, [see Wade v. Hunter, 336 U.S., at 691, 69 S.Ct., at 838], reflects the elusive nature of the problem presented by judicial action foreclosing the defendant from going to his jury. But that discretion must still be exercised; unquestionably an important factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process." 400 U.S. at 486-487, 91 S.Ct. at 557.

And of singular relevance to the instant facts, Chief Justice Berger thought it important to write a separate, concurring opinion (paragraph) to stress:

"If the accused had brought about the erroneous mistrial ruling we would have a different case. . ." 400 U.S. at 488, 91 S.Ct. at 558 (emphasis added).

In Washington's second trial, it was: "the accused", by way of his counsel, who brought about the mistrial ruling. Therefore, it is a different case from Jorn, and the Ninth Circuit's total reliance upon unrelated, segregated holdings in the Jorn opinion has neither basis in fact nor law.

Shades of Chief Justice Berger's concurring opinion were destined to appear three years hence in United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, L.Ed. 2d 267 (1976).

In revealing the Ninth Circuit's mistaken reliance upon Jorn, it is further enlightening to review several of the Circuit Court cases which have relied on Jorn in striking down mistrial rulings. Not one can be likened to the facts of Washington's second trial.

McNeal v. Hollowell, [supra at page 49] saw the Fifth Circuit, in 1973, examining a trial judge's ruling of nolle prosequi upon the prosecutor's request,

once he found out he could not make out a murder case against the defendant with the witnesses he had to testify. The trial court had immediately granted the district attorney's request, without requesting or listening to any suggested alternative solutions, and cutting off argument by defense counsel. 481 F.2d at 1148, n.3. The court held that the trial judge should have made a painstaking examination of all the facts and circumstances that underlied the request; that only then could he have properly exercised his discretion.¹⁷

¹⁷The Fifth Circuit, in building its rationale, made a statement of principle of utmost relevance to the case at bar, because it totally opposes the holding of Judge Walsh. That Court "took no issue" with the principle that "the language used by the trial judge in discharging the jury is not dispositive of the reasons behind the discharge." 481 F.2d at 1150, 1151. It was wholly unconcerned with what reasons the trial judge gave for granting the nolle prosequi (there were no findings of any manifest need--the judge gave as a reason that the prosecutor was unable to make out his case [id., at 1148, n.3]), and went into the record to determine that no manifest necessity and no ends of public justice required the ruling.

Here is a combination of events that at once lends itself to prosecutorial manipulation, portrays ill-reasoned, premature judicial behavior, and portends great potential for prejudice to the defendant. There is no resemblance to the facts now before this Court.

In United States v. Glover, 506 F.2d 291 (2nd Cir. 1974), the Second Circuit was faced with a prosecutor who offered, for the time, Bruton evidence during the trial, although the clear alternative was to have sought and obtained the ruling in advance. With particular emphasis that defendant Glover "had done nothing to bring about the contretemps that resulted in the declaration of mistrial" [id., at 297-298], and on the "Inadequacy of the government's proof discovered after the jury is empanelled" [id.], the Court ordered Glover's indictment dismissed after it opined:

"The thrust of the opinion [in Jorn] is that where the mistrial is not motivated for the benefit of the defendant, and the defendant has done nothing himself to create the problem,

he is entitled to his double jeopardy protection. . .

The Chief Justice concurred in the majority opinion in Jorn on the specific ground that the defendant had done nothing to bring about the mistrial ruling. . ."

Id., at 297.

The facts in Glover again show the prospect of prosecutorial manipulation, which is not an element in Washington's case, and more importantly, the crux of the decision is that the problem did not in any manner originate with the defendant.¹⁸ Here, the problem did originate

¹⁸The Second Circuit considered the gravity of the fault of the prosecutor in light of the fact that the problem he created could have been alleviated by obtaining a judicial ruling on his evidence prior to trial. As was argued by Mr. Butler to Judge Buchanan, Mr. Bolting had planned to attempt to introduce the Arizona Supreme Court opinion as evidence, and he should have obtained a ruling in advance, rather than wait until the jury had been empanelled and thereby create some error in the proceedings. [See App. 213-215 for this argument.]

with the defendant, through his counsel's improper opening statements to the jury.

The Fifth Circuit also decided United States v. Kin Ping Cheung [supra at p. 49] in 1973. The case was similar to McNeal v. Hollowell in that it provided "a tantalizing potential for prosecutorial misconduct". 485 F.2d at 692. The prosecution's witness had taken the stand and had given testimony tending to exculpate one of the defendants. The Court reasoned: "The Government, knowing what this witness would testify, would have a new opportunity at the later trial to seek a severance. . .and refrain from calling him at the other defendant's trial." Id. This case further involved a hasty, sua sponte mistrial declaration where no alternatives were suggested to and thereby considered by the trial judge. The Court concluded that the Government stood to gain great advantage from the mistrial ruling, and, supported by Jorn, ruled that double jeopardy had attached.

In keeping with the Supreme Court's reasoning in Jorn, the foregoing Court of Appeals cases all depicted, as

the instigator of the difficulty which occasioned the mistrial, the government, and all carried a potential for resulting prejudice to the defendant.

In Washington's second trial it is the other way around.

In final argument against the Ninth's Circuit reliance on Jorn, which caused the defendant's "valued right to have his trial completed by a particular tribunal" to be emphatically if not singularly stressed, in their Opinion, and which principle the Ninth Circuit loftily charged Judge Buchanan with neglecting,¹⁹ it should here be remembered that while Judge Buchanan was weighing and balancing the conflicting interests in a mistrial declaration (as it must be assumed he did while listening to hours of argument by counsel), Washington's right to a potentially favorable judgment by that tribunal had already been seriously, if not irrevocably, tarnished

¹⁹In concluding their Opinion, the Judges admonished that Judge Buchanan should have given more consideration to Washington's "valued right to have his trial completed by a particular tribunal," citing Jorn as authority for that reprimand.

by his own counsel's statements to that tribunal that Washington had previously been convicted of the crime for which he stood before them supposedly innocent until proven guilty. Moreover, Mr. Bolding admitted to Judge Buchanan on the second day of arguing the mistrial issue, that, "I'm not happy with the jury" empanelled to try Washington, [App. 245.] If Mr. Bolding did not like the jury, and if Mr. Washington did not like the jury²⁰

²⁰ In his opening argument, when Mr. Bolding had once more told the jurors that "George had been to prison", he hesitated and then said, "George didn't want me to tell you that". [App.179.] Further, "George" probably had not wanted Mr. Bolding to reveal his prior conviction. It would be unusual for a defendant to want his jury told that he had already been convicted for this murder by another jury four years ago. These revelations by defense counsel to the jury during voir dire and his opening statement patently diminished the actual value to be placed upon Washington's right to continue with this jury. It would be ignoring "the circumstances" of the case to conclude that Judge Buchanan did not consider this in his ruling.

surely the weight given to Washington's right to have that jury decide his guilt or innocence was lessened in the eyes of Judge Buchanan when he balanced that interest with the competing interest of the public in fair trials designed to end in just judgments [Wade, 336 U.S. at 688-689, 93 L.Ed. 974]. Judge Buchanan needed little argument to recognize that the trial had developed into something less than fair. A reading of the transcript of Washington's second trial yields the inescapable conclusion that that particular tribunal was no longer "the impartial jury" guaranteed to Washington as one of his fundamental rights.

From all the foregoing, which events Judge Buchanan was in the best place to observe, he could reasonably have found the delicate balance tipping in favor of the public's interest in just judgments. This right to take his case to the original jury, normally to be accorded great weight in the decision process of granting a mistrial, did not have for Washington the "value" that the Ninth Circuit placed upon it.

It can hardly be said that Judge Buchanan exercised unlimited, uncertain or arbitrary judicial discretion.

Relaxing the Limits on Retrial

Following closely on the heels of Jorn came the occasion for the Supreme Court to decide the merits of a mistrial ruling by a State court on Fifth Amendment grounds. Defendant Somerville was indicted by the Illinois grand jury, and after a jury was empanelled, the prosecutor discovered the indictment was insufficient to charge a crime and immediately moved for a mistrial. The Illinois trial court granted the State's motion. In affirming, this Court stated unequivocal adherence to the flexible Perez standard giving the trial judge broad discretion to decide a mistrial issue, and, after citing language in Wade and Gori to underscore the breadth of the trial judge's discretion, the Supreme Court considered the propriety of the trial judge's discretionary action in the context of that particular trial. In holding that the "mistrial met the 'manifest necessity' requirement" of the Supreme Court's cases, "since the trial court could reasonably have concluded that the 'ends of public justice' would be defeated by having allowed the

trial to continue" [Somerville, 410 U.S. at 459, 93 S.Ct. at 1068], the Court reassured its followers that the public's interest in fair trials designed to end in just judgments "had not been disregarded by this Court". 410 U.S. at 463, 93 S.Ct. at 1070. The Somerville justices, led by Justice Rehnquist, went on to establish the following approach for deciding double jeopardy issues:

"While all of the cases turn on the particular facts and thus escape meaningful categorization, [citations omitted], it is possible to distill from them a general approach, premised on the 'public justice' policy enunciated in United States v. Perez, to situations such as that presented by this case. A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in

the trial" (emphasis added).

410 U.S. at 464, 93 S.Ct. at 1070.

From a look at all the events in the trial record this Court should be able to find that Judge Buchanan could reasonably have concluded Mr. Bolding's statements had prejudiced the minds of the jury against the State so that an impartial verdict could no longer be reached.²¹

²¹Judge Buchanan could also very probably have concluded that the statements made by Mr. Bolding were improper as well as prejudicial. Somerville would seem to uphold a mistrial that implements a reasonable State policy; and the policy of the State of Arizona is to preclude any reference by counsel to evidence which has no bearing on the case at issue. Udall, Arizona Law of Evidence, 111 at § 201 (1960). Further, Rule 48(c), 17 A.R.S. Rules of the Supreme Court and Rule 314, 17 A.R.S. Rules of Criminal Procedure would have required the exclusion of the prior Arizona Supreme Court Memorandum Decision and evidence of alleged prosecutorial misconduct in the subsequent trial. [See pp. 9 - 12, supra for these reference materials; and see App.29 where the necessity of this exclusion is recognized by the Ninth Circuit.]

On this issue of prejudice, the holding of the Second Circuit in United States ex rel. Hetenyi v. Wilkins, 348 F.2d 844, (2nd Cir. 1964) is a significant and correct reflection of the law:

"The question is not whether the accused was actually prejudiced, but whether there is reasonable possibility [emphasis in the opinion] that he was prejudiced. [Citations omitted.] . . .

The ends of justice would not be served by requiring a factual determination that the accused was actually prejudiced in his third trial by being prosecuted for ~~and charged~~ with first degree murder, nor would the ends of justice be served by insisting upon a quantitative measurement of that prejudice."

Accord, United States ex rel. Stewart v. Hewitt, 517 F.2d 993, 996 (3rd Cir. 1975); United States v. Pridgeon, 462 F.2d 1094, 1095 (5th Cir. 1972); and see Whitfield v. Warden of Maryland House of Correction, 486 F.2d 1118, 1121 (4th Cir. 1973)

where the Court viewed the Perez doctrine in light of public justice concepts to hold that manifest necessity never implies an absolute need to declare a mistrial. But perhaps the clearest exposition of this rule is Mr. Justice Black's dictum in Wade v. Hunter:

"[T]here have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of a jury might be biased [emphasis in opinion] against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial." (Emphasis added.)
336 U.S. at 689, 69 S.Ct. at 837.

Not only is there a "reasonable possibility" that Mr. Bolding's opening statements prejudiced the jury against the State, it is quite probable. That Judge Buchanan could have seen this prejudice developing and concluded it was beyond cure is an easy conclusion to draw from the record.

The majority decision in Somerville, which offered some hope for meaningful analysis and predictable results, at the same time cautioned that Justice Story's formulation--

"abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial."
410 U.S. at 462.

The holding of the Ninth Circuit, built upon Judge Walsh's ruling--that in the absence in the record of any finding by the trial court of manifest necessity, or any indication that the court considered the efficacy of alternatives, the tests of Perez have not been met--is plainly a mechanical formula. The two reviewing courts have judged the propriety of Judge Buchanan's declaration of mistrial, born in the unique situation of possible jury prejudice against both parties, by this mechanical formula: Judge Buchanan made no findings of a manifest need; and he left no indicators

on the record that he considered alternatives. Therefore, the absence of both demands the conclusion that there was no manifest necessity for the declaration. That is the sum and substance of the lower courts' review for abuse of judicial discretion. It is evidently immaterial to these courts that alternatives to mistrial were canvassed, were argued to Judge Buchanan, on no less than seven occasions prior to his mistrial declaration. [See App.285-291 for the context of these arguments.] These courts demand statements, by the trial judge,²² on the

²²Judge Walsh states in his hearing on October 2, 1975, that "alternatives were not even canvassed" [App.128-129], evidently not considering detailed argument for and against cautionary instructions by both counsel as "canvassing", and requiring instead that the trial judge himself make statements about the alternatives. Likewise, the Ninth Circuit in their Opinion found no "indications that the court considered the efficacy of alternatives, such as an appropriate cautionary instruction to the jury" [App. 30.] Since there were certainly indications in the record that counsel had argued this very alternative to mistrial, the inference is patent that the Ninth Circuit also requires that the indication be made by the trial judge.

record, that he considered alternatives to mistrial. The State argues that when counsel for both parties have been given ample opportunity to argue their position on the mistrial declaration, (unlike the Jorn circumstance) and included in that argument are alternatives to mistrial preferred by defense counsel, (again, unlike Jorn) and the government argues against these alternatives, (unlike Jorn), that the atmosphere of free and competitive debate has been attained, and that it can be presumed that the trial judge took these alternatives, as part of all the circumstances he had thus far observed, into consideration in his decision.

In essence these lower courts are saying that they can not infer that Judge Buchanan considered alternatives to mistrial from the fact counsel argued these alternatives to him. In the entire record before this court, there is nothing to indicate that Judge Buchanan was anything but totally attentive and responsive to the events going on in his courtroom, and to the arguments of counsel. The conclusion is manifest that he considered the argued alternative solutions to mistrial. The "indications", if

the Ninth Circuit is in need thereof, can be found in counsels' arguments, over a two-hour period, to Judge Buchanan.

An examination of the competing interests affected by Judge Buchanan's mistrial ruling, even considering Washington's "valued" right to go to this jury, yields the inescapable conclusion that the result reached in Somerville was correct and that its relatively permissive standards toward retrial should have been respected and followed by the District Court and the Ninth Circuit. The following is an assessment of its applicability to the actual events of the second trial of Washington.

Balancing The Interests By The Events at Trial

The Supreme Court, in its entire history of mistrial jurisprudence, has reversed two trial judges. Downum involved a particularly unpardonable fault of the prosecutor--unpreparedness. There can be no equating that situation with the one presented in Washington's second trial. From a reading of the trial transcripts, it is plain that Mr. Butler

was fully prepared to try the case. And Jorn concerned a trial problem for which the judge was at fault--his erratic, unpredictable, unconsidered mistrial declaration, where no search for alternative solutions was made. The Jorn opinion made clear that alternates would have made the mistrial unnecessary. Id., U.S. at 487, 91 S.Ct. at 558. More importantly, the circumstance of that case did not involve jury prejudice. There was needed in that case no judge's assessment of the heated atmosphere of trial. The impact on the jury was not at issue, and therefore any reasons for deference to the trial judge's discretion, other than the Perez acknowledgment, were insignificant compared to defendant's right to take his case to the original jury.

In essence, the Supreme Court has refused to sanction a mistrial ruling when trial events lent themselves to prosecutorial manipulation, and when erratic action by a trial judge is coupled with the absence of his considering alternatives to mistrial. This refusal has been followed in the Circuit Courts.

Neither situation matches, or even resembles, the facts of Washington's second trial. It is crucial to distinguish that the difficulty leading to mistrial in both Downum and Jorn originated with the government.²³ In Washington's case the difficulty--the improper statements--the jury prejudice--was caused by Washington's defense counsel.

Observing the changing tides that have marked mistrial jurisprudence from Gori to Somerville only serves to underscore the difficulty of identifying the relevant factors and specifying how they are to be weighed. The Ninth Circuit, relying on Jorn, settled on three relevant factors--the absence of findings, or any indication of considered alternatives, and the defendant's valued right to complete his case before that particular jury. From the foregoing syllabus of Supreme Court cases alone, it becomes

²³Ergo Chief Justice Berger's warning that Jorn would have been examined differently had the defense brought about the mistrial declaration.

at once apparent that "findings" alone are not, and should not be, considered as indicia of whether or not there existed a manifest need to declare a mistrial, and have no place in the reviewing court's analysis of abuse of discretion.

The defendant's valued right to take his case to his chosen jury, while always a constant to be weighed in any circumstance of mistrial, has in this case been somewhat if not totally lessened by his own counsel's activities. It can not be said here that this factor was to be the fulcrum for Judge Buchanan's determination of manifest need for a mistrial.

The second factor, the absence of "any indication that the court considered the efficacy of alternatives", must be viewed in the context of the actual trial setting to determine the weight to be given thereto. As previously argued, the State believes that there exist abundant indications in the record that Judge Buchanan considered alternatives to mistrial because they were argued to him many times by counsel. From these

facts, which were before the Ninth Circuit, their observation must be taken to mean that the trial judge failed to place these indications on the record, which is true.²⁴

Be that as it may, the scrupulous search for alternatives, which the Ninth Circuit seemed to require of Judge Buchanan, is not compelling in this case. It is not a Downum nor a Jorn case. This is not a case of prosecutorial misconduct or manipulation, or illness or unavailability of prosecution witnesses, or one of erratic, arbitrary judicial behavior. This is a case of possible jury prejudice, a case where the trial judge's assessment of the impact that prejudicial information has had on a jury should be inviolate. If he has decided to declare a mistrial, this decision should be paid deference,

²⁴ Judge Buchanan never voiced his consideration of alternatives to mistrial for the record. It should also be apparent from the record that Judge Buchanan is not a particularly chatty, or effusive judge.

unless it was the product of clear abuse.

There is no abuse, either clear or obscure, by Judge Buchanan's mistrial declaration. This warranty is founded on two grounds: One, that a trial judge should not, and is not, required by case law, to scrupulously search for all the alternative solutions to mistrial when confronted with possible jury prejudice (discussed infra), and two, the actual circumstances giving rise to the mistrial in Washington's second trial left no alternative for Judge Buchanan but to declare a mistrial. An examination of the record is validation enough for this statement.

There are few effective cures for jury prejudice. Judge Buchanan could have called in each juror separately and asked whether or not the statements made by Mr. Bolding to the jury had caused him or her to be prejudiced against the state to the extent an impartial consideration of the facts was no longer possible. However, Judge Buchanan and counsel had already inquired of several of the jurors, during individual voir dire, if they had any knowledge of the

reason for the new trial. [Exh.1.pp.24-54.] This alone must have sparked some inquisitiveness in those veniremen's minds. If Judge Buchanan were to once again call in the jurors, and ask each one about the extent of their prejudice, now that they knew the reason for the new trial, so much emphasis would have been placed upon this one issue which was not even properly before them (because the information was inadmissible, and untrue), that the taint, instead of being reduced, would probably have been more firmly entrenched in the minds of the jurors. While this alternative was not "canvassed", it is reasonable to assume Judge Buchanan, an experienced judge, and before that an experienced and distinguished attorney, considered this during argument and discarded it as ineffective.²⁵

²⁵In Arizona, George Washington cannot legally be tried for murder by a jury of less than twelve persons. [See Art. 2, §23 of the Constitution of the State of Arizona, supra at page 12] Therefore, a possible alternative that a juror, or jurors, be withdrawn because of their incurable prejudice, and Washington tried to a smaller jury, is not even available.

Another possible, but not reasonable, alternative cure would have been a cautionary instruction to the jury to disregard Mr. Bolding's vilifying statements concerning the prosecutor in the first case. This alternative was in fact suggested to Judge Buchanan by Mr. McDonald, defense co-counsel, as a sufficient cure for the error. [App.288; and see 289 where Mr. Bolding suggests same.] And Judge Walsh suggested such instructions in his colloquy with Mr. Butler. [App. 128.] But this instruction, instead of effecting a cure, would also have served to emphasize the error.

It was noticed in United States v. Carter, 445 F.2d 669, 673 (D.C. Cir. 1971) by the District of Columbia Circuit, "[e]xperienced counsel frequently desire not to have a curative instruction which would focus the jury's attention" on remarks made by other counsel. Mr. Butler did not want a cautionary instruction to the jury²⁶ [see

²⁶Mr. Butler is an "experienced counsel" with six years involvement in criminal prosecutions.

App. 285-291.]-the jury's attention had already been "focused" on this issue of Washington's new trial. They had heard about it in Mr. Bolding's voir dire [Ex.1,p.22], they had been asked about it by Judge Buchanan in his voir dire, and had finally been told the story in Mr. Bolding's opening statement. Now, defense counsel wanted them to hear about it again through a cautionary instruction.²⁷

²⁷The trial judge plainly could not be guided solely by the solutions proposed by defense counsel, since it was their error that created the possible juror bias against the State. They could have no real interest in "curing" the prejudice since it could only work to the defendant's benefit. On the other hand, the prosecutor is well situated to judge the impact of such statements on his position and his case. Some deference by the trial court to attention of his suggestions for cure is thereby justified.

Either by individual questioning by Judge Buchanan on the extent of their prejudice, or by a cautionary instruction, four times the jury would have been directed to bring their attention to this issue of prosecutorial misconduct. The issue itself, without undue emphasis, is highly inflammatory (contrary to Mr. McDonald's viewpoint [App.288]). No fact could possibly prejudice the State's position in the minds of the jury more than one of a prosecutor's misconduct, especially when the highest court in their State supposedly ruled for the defendant sitting before them because of this misconduct. Telling them, in any combination of words, to disregard this alleged misconduct would have been insufficient to cure the contamination. And what is of essential importance, and what Judge Buchanan could not have cor-

rected by any means,²⁸ was that this information that had reached the jury, irrespective of its evidentiary impropriety, WAS NOT TRUE. The Arizona Supreme Court did not say what Mr. Bolding said it did; there was no intentional suppression of evidence by Mr. Cooper in the first trial [See App. 37-53,]; and Mr. Cooper, himself an experienced criminal prosecutor, had certainly not been "taken off the case" for this alleged "hiding" of evidence. [See App. 201-202].

Not only does the record itself disclose that no alternative solutions existed to cure the taint in Washington's jury, Circuit Court and the Su-

²⁸ Judge Buchanan could not have instructed the jury that the statements made by Mr. Bolding were untrue because one, he did not know anything about what occurred prior to this trial [See App. 209 for statements to this effect], and two, Such an instruction would naturally have lowered the jury's esteem for Mr. Bolding and caused to be inserted in their minds a possible prejudice against George Washington.

preme Court do not require trial judges to indicate a search for alternatives in cases of jury prejudice. Their discretionary rulings are given wide latitude in this instance.

The only two Supreme Court cases to directly pass upon juror prejudice in a mistrial circumstance were Simmons and Thompson. As has been pointed up, supra, the Simmons trial judge did not canvass alternative solutions. Once he discerned the potentially prejudicial information (against the government) had reached the jury, he declared a mistrial. This was upheld by Mr. Justice Gray as a proper exercise of his power "to prevent the defeat of the ends of public justice." 142 U.S. at 154, 12 S.Ct. at 174. Likewise, in Thompson there is not a hint of consideration to alternative solutions. A mistrial was declared once it came to the judge's attention that a juror had sat on the grand jury that indicted the defendant. In less direct consideration, while the issue was not jury prejudice, the Wade Supreme Court, recognizing it was a valid ground for mistrial, stated once the judge discovered possible jury prejudice it was his

duty to discharge the jury. No mention is made of a search for alternatives. [Wade, 336 U.S. at 689, 69 S.Ct. at 837.]

Respecting the current law, while the facts presented to the Somerville Court did not deal with jury prejudice, but rather state policy and procedure, the opinion itself deals with the circumstance in a manner that cannot be ignored. This Court cited Simmons and Thompson (juror bias) and Lovato (defective indictment) for the cases from which the Court could distill a general approach [quoted supra], "premised on the 'public justice' policy of Perez" [410 U.S. at 464]. This Supreme Court did not include the words, in its general approach that a mistrial is proper if an impartial verdict cannot be reached, "and alternatives to mistrial were considered." Given the Court's decision in Jorn two years prior, it is not easy to dismiss a literal reading of the general approach as an unintended one. The State believes the Supreme Court did not ever intend,²⁹ in a trial atmos-

²⁹ Given the cases of Simmons, Thompson, Wade and Somerville.

phere of possible jury prejudice, that before a mistrial ruling is upheld on appeal a trial judge must have exercised his judicial discretion by a "scrupulous" search for alternative solutions. The requirement this Court enforced in Jorn, that judges not foreclose the defendant's option [to take his case to the original jury] until a scrupulous exercise of judicial discretion is fulfilled, has no application to the issue of jury prejudice. The Ninth Circuit's evident search for caution and urgent circumstances and indications of considered alternatives should be replaced with a deference, except in the clearest cases of abuse, which this is not, to the trial judge's discretion.

The response of the lower courts has echoed adherence to this standard. In United States v. Chase (United States v. Parrish, United States v. Roy), 372 F.2d 453 (4th Cir. 1967) it was brought to the trial court's attention that the jurors had all read one newspaper article, and upon a poll, nine of them had read another article. Without inquiring of the jurors whether or not

they could still decide the case fairly, and without asking counsel what they wanted to do,³⁰ the judge declared a mistrial. The Fourth Circuit, "on this record" [372 F.2d at 466], could not find an abuse of discretion. It is important to note that this case involved several defendants, some being tried to the jury, and some to the judge. The affirmance that double jeopardy did not attach to the jury defendants was reached immediately, and with little trouble for Roy, a non-jury defendant. The Court stressed, (the Framers' familiar guidepost) "there is not the slightest suggestion that the convenience or benefit of the government was sought to be served." Id.

The Fourth Circuit then decided the companion case of United States v. Smith, 390 F.2d 420 (4th Cir. 1968).

³⁰The trial judge stated: "Now, what does [sic] the defendants want to do that did not have a jury trial? Well, I am not even going to ask you. I am going to declare a mistrial on it. . . ." [372 F.2d at 464].

Smith was a co-defendant of Roy's. [See United States v. Chase, supra]. The Court held the circumstances indistinguishable, although Smith's charges had been dismissed in court. The Circuit Court recognized that the Supreme Court was capable of close scrutiny of each mistrial circumstance to see whether with reference to the particular facts there has been oppression and harassment, [referring to Downum,] but saw none in this case.

". . . the Fifth Amendment as interpreted by the United States Supreme Court from [Perez] to United States v. Tateo [citations omitted] was meant to prevent oppressive exercise of the government's power to prosecute." Id., at 422-423.

In 1972, in full awareness of the Supreme Court's decision in Jorn, the Fifth Circuit decided United States v. Pridgeon, 462 F.2d 1094 (5th Cir. 1972). Pridgeon's witnesses, wife, and daughter-in-law, had been seen talking to a juror. Based upon this knowledge the trial judge declared a mistrial, and no alternative solutions were "canvassed". The Fifth Circuit had no trouble with rejecting Pridgeon's claim of double jeopardy.

"It is the trial judge who must first assess the effect of any alleged misconduct on the overall fairness of the trial. . ."

462 F.2d at 1095.

While defense counsel had told the judge the conversations were about mundane matters, totally unrelated to the trial,

"The trial judge had no way of ascertaining the true content of conversations that took place in violation of his express order. In addition, the juror may have developed some subtle emotional inclination toward the defendant from her conversations. . . It goes without saying that the prosecution, just as the defense, is entitled to a fair trial. . .

Pridgeon asserts that the trial judge also abused his discretion because he could have adopted one of the less drastic alternatives to a mistrial, for example F.R. Crim. Pro. 23(b). While it is true that there are alternatives to

a mistrial, we cannot say under the circumstances of this case, taking into account the Government's objections, that the trial judge abused his discretion by not adopting one of the alternatives." Id.

Under the circumstances of Washington's case, which are strikingly similar to Pridgeon's, the Ninth Circuit was in error to rule that Judge Buchanan had abused his discretion in declaring the mistrial.

Here, the Fifth Circuit relied primarily on Perez, Thompson, and Gori and concluded:

"Moreover, in the instant case it is the indiscretions of defendant's witnesses [emphasis in the opinion] and relatives that reasonably prompted the trial judge's concern regarding the fairness of the first trial. [Downum]. We cannot say that a single incorrect date on an indictment, an empanelled jury, and one-half day of testimony amount to a deprivation of Pridgeon's con-

stitutional rights by allegedly placing him in double jeopardy."

Id., at 1096.

The exact same statement can be said for Washington.

The Fourth Circuit was also given the opportunity to apply Jorn to an instance of jury prejudice when the trial judge did not consider alternatives prior to his mistrial declaration, and unequivocally chose to reject it in Whitfield v. Warden of the Maryland House of Correction, 986 F.2d 1118 (4th Cir. 1973). Defense counsel was making argument for acquittal before the trial judge when one of the jurors walked through the courtroom. The judge was not sure whether or not the juror had "heard anything" and suggested he be asked. Defense counsel objected and a mistrial was then declared. The opinion of the Court, in affirming the mistrial, begins with reliance on Perez and ends with Somerville. But what is reasoned in between is of paramount importance to the case at bar:

"Obviously, there was no manifest necessity in the sense

that it was clearly evident that mistrial was unavoidable, as it is, for example, when the jury is unable to agree or a juror becomes incapacitated. [citations omitted.] But the [Supreme] Court has never held that the Perez doctrine of manifest necessity implies an absolute need. Instead, it has read the requirement of manifest necessity in the light of the Perez concept of public justice. [Somerville.]

Perez's public justice policy embraces two components, "a defendant's valued right to have his trial completed by a particular tribunal." and "the public's interest in fair trials designed to end in just judgments." Ideally, these elements co-exist, but in some instances the first must be subordinated to the second. [Wade.] Expounding this theme, dictum in the Court's most recent interpretation of the

double jeopardy clause notes that the public justice policy of Perez is served by a mistrial when the jury cannot return an impartial verdict. [Somerville.] Whitfield relies primarily on [Jorn]. . . While Jorn is instructive, we think it is not controlling. Time and again, the Court has refused to formulate rigid rules governing the application of the double jeopardy clause, and it has pointed out that the cases generally turn on their particular facts.

[See [Jorn, Downum, Wade].] These cases illustrate that the Court's discussion of the Perez standard cannot be wrested from its factual context. Thus, the [Jorn] Court's ruling with respect to alternatives to mistrial when a judge perceives that witnesses have not been adequately cautioned cannot be applied literally to the problem confronting a tri-

al judge who fears that a juror has been exposed to improper influences.

The cases in which mistrials have been declared because of suspected juror bias support the conclusion that Whitfield's reliance on Jorn is misplaced. [Simmons, Thompson, United States v. Chase, United States v. Smith.] In each of these cases, after the jury had been impaneled and sworn, the trial judge received information which rendered suspect the ability of one or more of the jurors to reach an impartial verdict. The exercise of the trial judge's discretion in declaring a mistrial was upheld, and reprosecution was permitted over objections based on the double jeopardy clause. Significantly, in each case, after the trial judge had ascertained that a juror had received an improper communication, the reviewing court did not require the judge to de-

termine whether the communication had in fact prejudiced the juror. Discovery of the harmful communication in itself afforded grounds for mistrial."

Id. at 1122 and 1123.

The Court pointed out that "[t]he trial judge did not act sua sponte, before he declared a mistrial, that he sought the views of counsel for both defendants (exactly as had Judge Buchanan). Id. Their final conclusion rested on the trial judge's discretion exercised in an atmosphere of possible jury prejudice.³¹

³¹The trial judge wrote an opinion after he declared the mistrial. The Fourth Circuit Court evaluated his discretion from the opinion and "the transcript of the trial proceeding." 486 F.2d at 1122. It is relevant, in the context of Judge Walsh's ruling, that although the trial judge stated that his sole interest was to protect the interest of the defendant, this was "[a]t the outset [was] put aside", and "accorded little or no weight" by the Circuit Court. As the State has stressed in the foregoing analysis, and as this Fourth Circuit Court affirms, "findings" and "statements" of a trial judge as to his reasons for a mistrial are completely irrelevant and transparent to whether or not he abused his discretion--it is the trial record which tells the story for the reviewing court.

"As the cases dealing with the problem of juror disqualification indicate, a trial judge need not explore whether the extraneous communication has in fact prejudiced the juror. When a judge concludes that on the basis of facts and reasonable inferences to be drawn from the facts that a juror has been exposed to information that might taint his verdict, he may withdraw the juror in the exercise of his sound discretion without unconstitutionally subjecting the defendant to double jeopardy.

[Simmons.]"

Id.

To the same effect is United States v. Hewitt, 517 F.2d 993 (3rd Cir. 1975) where the defendant had relied on Jorn in a trial atmosphere of possible juror bias which he himself had created, and where his confrontation with his murder charge had spanned 14 years. The Court recognized that this defendant's right to conclude once and for all, his

confrontment of society through the verdict of tribunal he might believe to be favorably disposed to his fate was particularly important, but nonetheless was "not persuaded to say that this scrupulous exercise of discretion mandated in Jorn requires in every instance a thorough examination of the jurors and consideration of the alternatives to discharge, such as a continuance. We believe that the exercise of discretion by the trial judge may in fact be based, in particularly compelling cases, solely on a common sense assessment of the possibility of that a certain factual situation may jeopardize the ends of public justice". 517 F.2d at 996. Accord, United States v. Barclift, 514 F.2d 1073, 1074, (9th Cir. 1975); and Parker v. United States, 507 F.2d 587, 589 (8th Cir. 1974), cert. denied, 95 S.Ct. 1576 (1975), where "[n]either the prosecutor nor the court was to blame for the [prejudicial radio broadcast]." See also United States v. Walden, 448 F.2d 925 (4th Cir. 1971) where the Circuit Court applied Jorn to circumstances of possible juror preju-

dice where no alternatives were considered by the trial judge, and then on rehearing, reversed itself on that basis. 458 F.2d 36 (4th Cir. 1972).

The approach is the same today as it has always been. Nevertheless, the Ninth Circuit has chosen to disregard the Supreme Court's long-standing observance in Simmons, Thompson, Wade, and Somerville; chosen to ignore the opinions and rationale of its sister courts in the Third, Fourth, Fifth, and Eighth Circuits. It is evident from the record of Washington's second trial that the concern of Judge Buchanan was to secure for both parties a fair trial before an impartial jury unaffected by whatever reaction, conscious or unconscious, Mr. Bolding's remarks about the Arizona Supreme Court's holding of prosecutorial misconduct might have engendered in their minds. The Simmons holding echoed loudly in the portals of Judge Buchanan's courtroom:

"Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice can-

not be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection. . ."

142 U.S. at 148, 12 S.Ct. at 171.

The circumstances of possible jury prejudice to both parties, which confronted Judge Buchanan after Mr. Bol-
ding's voir dire and opening statement, were sufficiently extraordinary and striking to accord him some reasonable discretion in how to proceed fairly to all concerned. To have allowed that trial to continue would have resulted in a dual trial of the State of Arizona and Washington. Such a circumstance would surely confound and distract the jury. The end result would be a trial to a jury that was confused and prejudiced, with its attention directed from the real issue and focused upon the disentanglement of the collateral, improperly inserted issues of whether the State really was guilty of purposefully hiding evidence from George Washington at the last trial. Judge Buchanan did not abuse his discretion when he chose the only

reasonable alternative to this otherwise inevitable outcome. The accorded interest of Washington, to have this jury decide his guilt or innocence, had been justly overridden by the public's interest in fair and impartial tribunals to pronounce a just judgment. To uphold the Ninth Circuit's judgment, which tilted the scale the other way, will be to withhold the right accorded the State to a fair and impartial jury.

Defense Counsel's Precipitation of Mistrial

It is the State's position that where a defendant actively engages in a course of conduct calculated to necessitate the granting of a mistrial, who does not actually request a mistrial but provokes the State to request a mistrial, defendant is barred from relying on the Fifth Amendment right to be free from double jeopardy. Washington, through the bad faith conduct of his counsel, cannot bait the Court and the prosecutor into a mistrial ruling and then hop under the Constitution for protection.

This principle is not new to this Court. In 1976, United States v. Dinitz

424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed. 2d 267 (1976), decided upon the issue of consent, became the vehicle for this Court to stress its distaste for this chicanery. This court noted the "improper" conduct of defense counsel, and no mention was made, as was made by the Ninth Circuit [App. 31] that the trial judge failed to find it was also prejudicial. The impropriety was not only that it tended to prejudice the other side, but that evidence not capable of proof was addressed to the jury. Because there was no overreaching or bad faith on the part of the government (reversing the Fifth Circuit's Jorn-ian holding), and because the defendant was not prejudiced by retrial, and because it was defense counsel who interjected the error, double jeopardy did not obtain.

Chief Justice Warren Burger's concurring opinion seems to foretell the state of events in Washington's second trial. Underpinning the opinion is the corresponding right of the State to a fundamentally fair trial, as well as the severity of such an impropriety.

"I add an observation only to emphasize what is plainly

implicit in the opinion, i.e. a trial judge's plenary control of the conduct of counsel particularly in relation to addressing the jury. An opening statement has a narrow purpose and scope. It is to state what evidence will be presented. . . it is not an occasion for argument. To make statement which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict. A trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop such profession-

al misconduct. Here the misconduct of the attorney, Wagner, was not only unprofessional per se but contemptuous in that he defied the court's explicit order.

Far from 'overreacting' to the misconduct of Wagner, in my view, the trial judge exercised great restraint in not citing Wagner for contempt then and there." 44 L.Ed. 2d at 276-277.

The State wonders what Chief Justice Berger would think of the conduct exemplified by Washington's counsel, who also told the jury something he could not prove-- not only because the Arizona Supreme Court Memorandum Opinion was wholly inadmissible, but because the opinion does not state or even imply the County Attorney was guilty of misconduct in purposely withholding and hiding evidence from Washington at his first trial. [See App. 7-15 and 35] Washington's counsel falsely explained the holding of the Arizona Supreme Court Memorandum Opinion the jury to make them distrust the "County Attorney", to make them wary of the case the "County Attorney" presents

to them. Defense counsel had a copy of the memorandum opinion [see App. 205-206, where defense counsel placed the opinion on Judge Buchanan's bench]. He knew its contents. He knew the opinion did not even allude to misconduct of a County Attorney.

Such activity is the quintessence of impropriety. Because of this impropriety, which was aimed at outraging the jury against the State, Judge Buchanan declared a mistrial. Under the doctrine of necessity, misbehavior of defense counsel that intrudes on a fair trial permits retrial. Couple this with the absence of any governmental overreaching, and the care and deliberation that Judge Buchanan gave to Mr. Butler's request for a mistrial and to defense counsel's arguments, the only conclusion is that the Ninth Circuit and the District Court should be

REVERSED.

PAGINATION AS IN ORIGINAL COPY

CONCLUSION

The State's arguments have presented to this Court the picture of an able trial judge faced with the dilemma of conflicting constitutional mandates: The right to an impartial jury guaranteed by the Sixth Amendment versus the Double Jeopardy Clause of the Fifth Amendment. The State has shown that Judge Buchanan solved the problem well within his discretion, and that he acted with commendable fairness and with an eye to the best interests of both the defendant and the State. In Judge Buchanan's courtroom, defense strategems in violation of the rules of evidence and the sanctity of an impartial jury, leading to the introduction of highly prejudicial evidence not capable of proof, were not tolerated.

The State very respectfully requests the Supreme Court of the United States to reverse the decision of the Ninth Circuit on this issue, and to hold that George Washington, Jr. is not in custody in violation of the Fifth Amendment's proscription against double jeopardy.

This Petitioner's Brief is
respectfully submitted this 20th day
of June, 1977.

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STATE OF ARIZONA)
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I, VICTORIA A. KING, hereby certify
that I have served a copy of the foregoing
Petitioner's Brief upon Respondent George
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the same in the United States Mail, with
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SUBSCRIBED AND SWORN to before me
this 19th day of June, 1977, by VICTORIA
A. KING.

Dorothy P. Hillgrove
Notary Public

My Commission Expires:

6-16-78

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1168

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA,

Petitioner,

v.

GEORGE WASHINGTON, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1168

STATE OF ARIZONA, RICHARD BOYKIN,
SHERIFF, PIMA COUNTY, ARIZONA,

Petitioner,

v.

GEORGE WASHINGTON, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The Opinion of the Court of Appeals (App. 22-34) is reported at 546 F.2d 829.

The Opinion of the Arizona Supreme Court, filed June 20, 1974, (App. 7-15 & 35) (pages in the Appendix are out of order) is unreported.

JURISDICTION

The Petition for Writ of Certiorari herein was not timely filed in that it was not filed with the Clerk of this Court within thirty (30)

days after the entry of the Judgment of the United States Court of Appeals for the Ninth Circuit as required by Rule 22(2) of the Rules of this Court, and no extension of time for applying for a Writ of Certiorari was requested or obtained. See *United States ex rel. Coy v. United States*, 316 U. S. 342 (1942); *Cf., Schlanger v. Seamans*, 401 U. S. 487, 490 n.4 (1971); *Harris v. Nelson*, 394 U. S. 286 (1969). Therefore, this Court may dismiss Petitioner's Petition herein as improvidently granted.

QUESTIONS PRESENTED

Petitioner's framing of the questions presented appears unnecessarily verbose and repetitive, deviates from the form of questions presented in its Petition for Writ of Certiorari, and is unrelated to the organization of its Brief. Respondent, therefore, has organized his argument under the following two questions, the first of which appears to Respondent to be an accurate condensation of the first three questions presented by Petitioner (Petitioner's Brief 13-14), and the second of which appears to Respondent to be an accurate condensation of the fourth question presented by Petitioner (Petitioner's Brief 14).

Within the protection afforded by the Due Process Clause of the Fourteenth Amendment and the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States:

1. Did the Court of Appeals' Opinion in this case require that a trial court make a specific finding of manifest necessity or consideration of alternatives to mistrial before granting a mistrial, regardless of the circumstances of record, and should retrial, therefore, be required?

2. Did defense counsel deliberately provoke a mistrial in this case, and should retrial, therefore, be required?

STATEMENT OF THE CASE

Respondent believes that Petitioner's Statement of the Case in its Brief is unnecessarily verbose and contains inaccuracies, unwarranted characterizations, and innuendoes. Thus, Respondent submits the following:

On May 21, 1971, George Washington, Jr., was found guilty by a jury of first degree murder, arising out of an incident in which a hotel night clerk was killed in the course of a robbery on December 13, 1970. Thereafter, the trial court granted a new trial "on the grounds of violation of due process and newly discovered evidence." (App. 6.) On appeal by the prosecution, the Arizona Supreme Court affirmed the grant of a new trial. The unanimous court wrote:

The rule in Arizona at the time of the alleged offense was Rule 311 . . . which states in part that:

"A. The court shall grant a new trial if any of the following grounds is established, provided the substantial rights of the defendant have been thereby prejudiced:

...

"5. That the county attorney has been guilty of misconduct."¹

...

"B. The court shall also grant a new trial when from any other cause not due to his own fault the defendant has not received a fair and impartial trial."

Defendant argues for a new trial on the ground that he was prejudiced by the deliberate suppression of evidence by the State.

On the issue of suppression of evidence, the United States Supreme Court has stated in *Brady v. Maryland* . . . that:

"[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material to guilt or to punishment."

...

¹Emphasis added.

In the case at bar, an alleged eyewitness named Hanrahan told the Tucson Police Department, the Pima County Sheriff's Department and the Pima County Attorneys' Office that he had seen the murderer flee from the scene of the crime and that it was *not* the Defendant. The murderer was vividly described by Hanrahan as a Negro male, very heavy set, with a pot belly, no moustache, and sporting a very big Afro hair style. Defendant is a much lighter weight Negro male with a crew cut and a moustache.

Hanrahan subsequently changed his story. However, the initial statements of Hanrahan which tend to absolve Defendant from criminal liability were never disclosed to the defense counsel nor to the court.

There is no evidence more valuable to a defendant than the testimony of an eyewitness that he did not commit the crime in question. The prosecution has an affirmative obligation to assure that a defendant receives a fair trial. The suppression of evidence was clearly prejudicial to the Defendant and a new trial was warranted. (App. 9, 35, 10.)²

Additionally, the court held that the grant of a new trial was affirmable on the ground that eyewitness Hanrahan's original statements constituted newly discovered evidence unknown to the defense at the time of trial despite diligent inquiry. (App. 10-14.) The court recognized defense counsel's efforts to ascertain the nature and extent of Hanrahan's knowledge of the murder. (App. 12.) Pointing out that when Hanrahan had been interviewed by defense counsel, the prosecution had taped a concealed microphone and transmitter to Hanrahan's body, enabling the prosecution to eavesdrop upon and record the conversation between Hanrahan and defense counsel (App. 12-13), the Arizona Supreme Court concluded, "that any attempt by defense counsel to obtain information from Hanrahan would have been futile because of the close working relationship between Hanrahan

²The Appendix prepared by the Petitioner presents the pages of the Opinion out of order. The matters set forth below were contrary to the agreement reached between counsel for the parties herein as to what was to be included in the Appendix: Petitioner's arrangement of the Arizona Supreme Court Opinion, App. 7-14, 35; and App. 275-291 were recapitulated from App. 226-227, 233, 241, 252-253, 264-266, 268-269.

and the government." (App. 13.).

The court further noted:

The primary issue at trial was the identity of the assailant. No one at trial identified Defendant as the assailant. Thus, the direct eyewitness testimony of Hanrahan on the issue of the identity of the assailant, if offered at a new trial, would in no way be cumulative. Testimony as to the identity of the assailant is material for it would tend to disprove the commission of the crime by the Defendant. (App. 13.)

Respondent's new trial commenced on January 8, 1975, and during the voir dire of the jury, the prosecutor stated:

You may also see in this case the witnesses, or many of the witnesses that have testified, or will testify before you, have testified in at least two prior proceedings, because we have transcripts of what they said four years ago. (App. 151.)

He went into some detail regarding the possibility that witnesses' testimony might be inconsistent with their prior testimony and asked, *inter alia*, "Are there any of you that would automatically say, 'That person must be a liar'?" (App. 152.) Defense counsel moved for a mistrial on the grounds that the obvious conclusion to be drawn from the prosecutor's reference to "prior proceedings" four years ago for which "we have transcripts" and the fact that the Defendant was in custody was that Mr. Washington had had a former trial and been convicted. (App. 159-163.) The motion was denied. (App. 163.) Further in his voir dire, the prosecutor stated, "The testimony will reveal that the witnesses, the actual eyewitnesses to the robbery, are unable to get up in court and point with proof positive that George Washington, Jr., was the robber." (App. 155.) In that connection, the prosecutor inquired:

Are there any of you that do not realize that one of the purposes in carrying a weapon during an armed robbery, so that witnesses will be watching that weapon, and not the face of the robber? (App. 155.)

Defense counsel objected to the question as being improper voir dire and going "outside the record" with regard to what testimony would be admitted. The objection was sustained. (App. 155-156.)

In the course of the defense voir dire, defense counsel stated that

he was sure nobody among the prospective jurors "has any doubt what those proceedings four years ago" which the prosecutor had referred to were. He asked if the veniremen could lay aside the fact of a prior trial and simply consider the present trial. (Transcript of Defense Voir Dire 22.) Defense counsel also stated as follows:

We think you'll hear some evidence to the fact that there was evidence hidden from George at the last trial. Now I believe that that evidence will be brought forth. Will you consider any evidence that's brought forth to you and the Judge allows us to put on the witness stand, would you consider any of that and judge the credibility of the witnesses, in other words, judge their believability based on what you hear from the witness stand, their conduct, how they act, what they testified to? (Transcript of Defense Voir Dire 22-23.)

Significantly, no objection was made to these remarks and no request was made for an instruction to the jury to disregard them.

Following the defense voir dire, the prosecutor asked if he could examine the individual jurors to determine (1) "if any of these individuals know that the motion for a new trial was granted because the State failed to produce some evidence," and (2) "if that fact would cause them to feel at this time, or that they would have some prejudice against the position of the State because of that." (Transcript of Defense Voir Dire 35.) Defense counsel did not object to such an examination. (Transcript of Defense Voir Dire 36-37.) The court fully authorized and the prosecutor thus conducted his requested examination. Thereafter, the prosecutor said that if defense counsel introduced a witness named Hanrahan, the prosecutor might call the defense attorney as a witness. (Transcript of Defense Voir Dire 55.)

In his opening statement, the prosecutor told the jury that some of his witnesses had testified at a preliminary hearing, which he said was a hearing before a magistrate. He continued:

As the State presents its evidence and a result of that hearing, the Judge considers the evidence, makes a decision, and the result of his decision, the information is filed. (App. 169-170.)

Defense counsel objected that "that's going to be outside the record," but the trial court denied his objection. (App. 170.)

In the defense's opening statement, defense counsel stated, *inter alia*, that the defense would present a variety of exculpatory evidence. Such evidence would concern the fact that eyewitnesses had identified persons other than Mr. Washington as the suspect in the case, had given original descriptions of the suspect inconsistent with Mr. Washington's appearance, and had positively declared that Mr. Washington was not involved in the case, that he had been at a friend's home the entire day of the incident, and that various prosecution witnesses were biased or had motives to lie. Defense counsel referred to the prosecution's prior suppression of exculpatory evidence, stating:

You will hear testimony that, notwithstanding the fact that we had a trial in May of 1971 in this matter, that the prosecutor hid those statements and didn't give those to the lawyer for George, saying the man was Spanish speaking, didn't give those statements at all, hid them. (App. 180-181.)

You will hear that that evidence was suppressed and hidden by the prosecutor in that case. You will hear that that evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case. (App. 184.)

Again, no objections were lodged at the time these statements were made, although the prosecutor objected to other portions of the opening statement.

Following the opening statements, the court recessed for lunch. That afternoon, the prosecutor moved for a mistrial on the following grounds: that defense counsel used some argument in his opening statement; that he, the prosecutor, didn't believe the defense would be able to produce witnesses referred to; that the defense shouldn't be allowed to put on evidence of past prosecutorial misconduct in the case; and that, if the motion for mistrial were not granted, the prosecution would be "forced" to call witnesses to prove that the defense counsel was "guilty of subornation of perjury." (App. 187-190.) Defense counsel responded that "I said nothing this morning that I don't believe the evidence will show" and "that I did not honestly intend or think that I could prove in the way of evidence." He apologized for the

portions of his opening statement which were argumentative in tone, avowed that though a continuance had been unsuccessfully sought to allow additional time to locate witnesses, he believed all the witnesses referred to would be located and called. Further, defense counsel invited the prosecutor to try to prove that he had suborned perjury. (App. 191-193.) As defense counsel stated to the court, "You know it didn't happen, everybody knows it didn't happen, but if he wants to attempt to do that, that's fine, too." (App. 193.) Defense counsel offered to divulge to the court at that time *in camera* before a court reporter how he intended to get into evidence the matters referred to in his opening statement. (App. 203-204.) His offer was ignored.

The court indicated that it accepted defense counsel's avowal that he believed he could prove that which he told the jury the evidence would show. (App. 211.) Defense counsel stated that he intended to prove prosecutorial misconduct in order to attack the credibility of prosecution witnesses. (App. 211-13.)³ The trial court acknowledged that if a prosecution witness had failed to

³Sgt. Larry Bunting of the Tucson Police Department was the prosecution's chief investigator in this case. Therefore, his testimony at trial would have been a crucial part of the prosecution's case. Throughout the proceedings, the defense maintained that Bunting was involved in the prosecution's failure to disclose *Brady* materials, as well as matters pertaining to Mr. Rodriguez (App. 79-80, 94-97, 100-105, 179-183) and Mr. Hanrahan (App. 7-14, 35, 37, 44, 54-76, 86-90). In addition to other damaging material which cross-examination would have revealed, Bunting's testimony of November 26, 1974, at the hearing on Mr. Washington's motion to dismiss is conspicuously telling:

Q: You probably have told me that kind of information, but what I am talking about is back at the time of the trial in 1971, May of 1971, and before — between December — between the preliminary hearing and May of 1971, is it your testimony that you did not tell me, [next page] indicate to me, that Rodriguez was gone, but when you found him, he was going to identify George?

A: I don't recall.

Q: Do you deny that:

A: I don't really recall any conversation. I may have said it and I may not have. There is —

Q: That's —

A: *There is a number of times I talked to you when I really don't tell you the truth.*

(continued)

bring some matter to the attention of the authorities or had made a deal with a witness in return for particular testimony, such might well be admissible to test his credibility. (App. 212-213.) The court denied the motion for mistrial. (App. 223-225.) Testimony of two witnesses was thereafter taken.

The next morning, the prosecutor again moved for a mistrial on the same grounds as before. (App. 226-241.) The prosecutor advised the court that he and three other attorneys researched the matter the previous night. (App. 231.) Defense counsel indicated that he had relied on the court's earlier denial of the mistrial motion and was not prepared to reargue it. (App. 242.) Nevertheless, there was a brief response. Thereafter, the following dialogue occurred between the prosecutor and the court:

The only cure, your Honor, is a mistrial. The State is well aware that if the position I'm taking is wrong, if a mistrial is not proper, that man walks, I know that.

THE COURT: And I expressed my concern about that, Mr. Butler.

...

THE COURT: Have you considered the effect that, I think, my recollection is that you failed to object for the record in point of time to that particular statement on the merits —

MR. BOLDING: He did.

THE COURT: — of a review of the granting of a motion for mistrial.

MR. BUTLER: Yes, your Honor, I have. (App. 253-254.)

The trial judge gave defense counsel fifteen minutes to provide it with any additional legal authority. (App. 256 & 258.)

Defense counsel argued that the real reason for the prosecutor's

(footnote continued from preceding page)

Q: Okay.

A: When I am not on the stand.

Q: All right.

MR. BOLDING: I think that is probably indicated by the testimony, and I have no other questions.

(Emphasis added.)

motion was that the jury was likely to find Mr. Washington not guilty. (App. 258 & 263-264.) Defense counsel warned that since the prosecution failed to object or request relief short of a mistrial and because Mr. Washington would not substantially be prejudiced if the court granted a mistrial, the defense would move for Mr. Washington's release on double jeopardy grounds. (App. 263.)

In a patently untrue statement, Petitioner's Brief alleges that one of Mr. Washington's attorneys admitted "that there was error by the defense." (Brief of Petitioner 39.) What was said is as follows:

I don't think this jury is inflamed or impassioned at the State. I think there's material the State doesn't want them to know about but it's clearly discretionary and if there is error, it seems to me that it's not the kind of error that has created a jury atmosphere that cannot render the State a fair trial . . . (App. 265.)

The trial court ruled as follows:

Based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court Opinion and its effect for the reasons for the new trial, the motion for mistrial will be granted. (App. 271-272.)

A special action⁴ was brought in the Arizona Supreme Court on Mr. Washington's behalf challenging the granting of a mistrial. The Arizona Supreme Court declined to accept jurisdiction. (App. 17.) Then Respondent moved in the trial court to dismiss or quash the information against him, and, upon denial of that motion, petitioned the Arizona Supreme Court for a writ of habeas corpus, which that court denied. (App. 18.)

Thereafter, the United States District Court for the District of Arizona considered and granted Respondent's petition for a writ of habeas corpus. (App. 19-21, 81-142.) The District Court held that retrial of Mr. Washington was barred by the Double Jeopardy Clause of the Fifth Amendment as applied to the states by the Due Process Clause of the Fourteenth Amendment. Both parties

⁴By 17A Arizona Revised Statutes Annotated, Rules of Procedure for Special Actions, Rule 1, the common law actions for writs of certiorari, mandamus or prohibition are consolidated under one form of "special action."

appealed aspects of the District Court's decision. On December 3, 1976, the United States Court of Appeals for the Ninth Circuit held that the Double Jeopardy Clause barred retrial of Mr. Washington. (App. 22-34.) The prosecution thereafter petitioned this Court and the Petition for a Writ of Certiorari was granted on April 18, 1977.

SUMMARY OF ARGUMENT

I.

The Opinion of the Court of Appeals herein did not hold that a trial court must make a finding of "manifest necessity" or a statement rejecting alternatives to mistrial in order to avoid double jeopardy considerations barring retrial. It did hold that on the record of this case, it was not readily apparent that the two or three sentence reference to the decision of the Arizona Supreme Court made by defense counsel in his opening statement had prejudiced the jury to the extent of precluding a fair trial. Thus, it held that it could not presume on the face of a silent record that the trial court had given due consideration to available alternatives before declaring a mistrial.

Under Arizona law, it was appropriate to prove past prosecutorial misconduct in this case and the remarks of defense counsel which the trial court took as the basis for mistrial were permissible.

Under the circumstances of the case at bench, retrial is barred by the Double Jeopardy Clause. The substantial interests of the Defendant would be harmed by the declaration of a mistrial and by any retrial herein, whereas no countervailing public interest necessitated termination of the trial proceedings. Here, the granting of a mistrial involved great danger of prosecutorial manipulation and defense prejudice, as well as erratic and arbitrary judicial behavior.

Review of mistrial cases would be aided by requiring a showing on the record of consideration of alternatives considered by the trial court prior to declaring a mistrial.

II.

Petitioner is precluded from raising the issue of deliberate provocation of a mistrial in this case since it was not raised below. In truth and in fact, there was no deliberate provocation of a mistrial by the defense, as the record clearly demonstrates. Regrettably, Petitioner is embarked on a campaign of vilification of defense counsel. Moreover, no basis exists for departing from the standard of manifest necessity.

ARGUMENT

In view of the lengthy presentation in the Petitioner's Brief, Respondent wishes to indicate that the failure in this Brief to respond to any particular matter therein is a result of a conscious attempt to be succinct and germane, and is not intended as an admission or waiver of such matter.

DISTINCTIONS IN ARIZONA PROCEDURE

Respondent respectfully directs the Court's attention to certain distinguishing characteristics of Arizona state court procedure applicable to this case in order to avoid the misapprehension by the Court that impropriety occurred where counsel were actually conforming to the practice then accepted in this State, but deviating from the practice of many jurisdictions.

Under the rules of procedure governing this case, the trial court was required to permit counsel for both parties to conduct a voir dire examination of prospective jurors. *State v. Lovell*, 97 Ariz. 269, 272, 399 P. 2d 674, 675-676 (1965); Rule 217(A), Arizona Rules of Criminal Procedure, promulgated June 18, 1955, effective January 1, 1956 (contained in superceded Volume 17 of the Arizona Revised Statutes Annotated (1956)). And considerable latitude in framing questions propounded to prospective jurors was allowed a defendant on trial for his life or

liberty so that he could intelligently exercise his peremptory challenges. *E.g.*, *State v. Jordan*, 83 Ariz. 248, 252-253, 320 P. 2d 446, 448-449 (1958).

Arizona has adopted the so-called "English" rule, providing that the scope of cross-examination is not limited by the scope of direct examination, but is only limited by considerations of relevancy and materiality. *E.g.*, *State v. Gilreath*, 107 Ariz. 318, 320, 487 P. 2d 385, 387 (1971); Rule 272, 1956 Arizona Rules of Criminal Procedure, superceded Volume 17, Arizona Revised Statutes Annotated; Rule 43(g), Arizona Rules of Civil Procedure, 16 Arizona Revised Statutes Annotated; Rule 19.3(a), Arizona Rules of Criminal Procedure, 17 Arizona Revised Statutes Annotated. In Arizona, impeachment evidence such as prior inconsistent statements of a witness is admissible as substantive evidence. *State v. Skinner*, 110 Ariz. 135, 515 P. 2d 880 (1973).

I.

**THE OPINION OF THE COURT OF APPEALS
HEREIN DID NOT REQUIRE A TRIAL
COURT TO MAKE SPECIFIC FINDINGS OF
MANIFEST NECESSITY BEFORE GRANT-
ING A MISTRIAL, AND, IN ANY EVENT,
RETRIAL IN THIS CASE SHOULD BE
BARRED.**

A. The Opinion of the Court of Appeals Herein Did Not Require a Trial Court to Make Specific Findings of Manifest Necessity Before Granting a Mistrial.

While the "absence of any finding by the trial court or any indication that the court considered the efficacy of alternatives such as an appropriate cautionary instruction to the jury" (546 F.2d at 832, App. 30) was one of the factors considered by the court, it was careful to point out that its decision was based upon the circumstances of this particular case and that it was not

requiring trial courts to make such findings.

We do not hold that these words are talismanic; we hold only that this particular record fails to reveal a "scrupulous exercise of judicial discretion," and that more consideration should have been given to the appellee's "valued right to have his trial completed by a particular tribunal." 546 F.2d at 832. (App. 30.)

The Court of Appeals concluded that certain of defense counsel's remarks in his opening statement (App. 25, 184) were improper, but only to the extent that they referred to what the Arizona Supreme Court had said about the conduct of the county prosecutor (546 F.2d at 832 & 832 n. 2; App. 29).³ The court could not find such "impropriety" to be of such a magnitude that it could imply "that the jury was prevented from arriving at a fair and impartial verdict." 546 F.2d at 832. (App. 29-30 & 34.)

Two judges on the panel wrote a concurring opinion emphasizing that, not only was a finding of manifest necessity not explicitly made by the trial court, but also, such a finding was not implicit in the record. 546 F.2d at 832-833 (Opinion of Merrill and Anderson, J.J.). (App. 31-32.) They noted that the trial court in this case was required to find not only that certain conduct was improper, but moreover, that it was "such as to prejudice the jury beyond remedy by a cautionary instruction or other means and thus preclude fair trial by that jury." 546 F.2d at 832. (App. 31.)

Among the factors the court considered important in the record were the following: (1) the greater part of argument upon the mistrial motion was devoted to whether defense counsel's remarks were improper, and, specifically, whether the Arizona Supreme Court decision could be brought to the jury's attention; (2) when the motion was first argued, the Judge indicated that he would be disposed to grant mistrial if the Supreme Court decision was not admissible in evidence; (3) when first made, the motion was denied because the trial court was not ready to rule on admissibility; (4) the motion was renewed the following day,

³In fact, the remarks did not refer to what the Arizona Supreme Court had said, but, rather, to what it had done, "granted a new trial in this case."

at which time an Arizona rule of practice (Criminal Rule 314) was for the first time called to the court's attention; and (5) at the conclusion of this second period of argument, mistrial was granted. 546 F.2d at 832-833. (App. 31-32.) Given the foregoing, they found it "quite possible that the grant of mistrial was based on the fact that the impropriety of counsel's conduct had been established without reaching the question whether there could, nevertheless, be a fair trial." 546 F.2d at 833. (App. 32.)

An additional factor which neither Opinion notes, but which was called to the Court of Appeals' attention by the District Court (App. 129), was the prosecutor's statements to the court that he realized that if the position he was taking was wrong, Mr. Washington "walks" (App. 253) and that he was willing to take the risk (App. 225).

In essence, the Court of Appeals' Opinion held that the record did not establish that the jury had been improperly prejudiced to the extent of precluding a fair trial as a result of defense counsel's remarks in his opening statement. Furthermore, given such a record and the absence of any findings by the trial court, it could not second-guess the trial court's state of mind and presume that due consideration had been given to alternative means of remedying improper prejudice, if any, other than declaring a mistrial.

B. The Claimed Offending Remarks Made During the Defense Opening Statement Were Not Error Under Arizona Law.

The portion of defense's opening statement which Petitioner asserted and the trial court found were error and warranted a mistrial were claims that evidence would establish (1) that the prosecution had purposely withheld evidence from the defense, and (2) that because of such misconduct the Arizona Supreme Court had granted a new trial in this case. (App. 184, 271-272.) The Petitioner claimed that these matters could not have been proven at trial, and in particular, asserted that bringing up the

fact of prosecutorial misconduct was error. (E.g., Petitioner's Brief 125.) The Petitioner's argument is contrary to Arizona law.

Arizona is committed to permitting accused persons in criminal proceedings an extremely broad scope of cross-examination and impeachment concerning bias, prejudice, motive and interest of the prosecution and its witnesses. E.g., *State v. Ramos*, 108 Ariz. 36, 492 P. 2d 697 (1972); *State v. Reynolds*, 104 Ariz. 149, 449 P. 2d 614 (1969); *State v. Burruell*, 98 Ariz. 37, 401 P. 2d 733 (1965); *State v. Torres*, 97 Ariz. 364, 400 P. 2d 843 (1965); *State v. Hoiden*, 88 Ariz. 43, 352 P. 2d 705 (1960); *State v. Little*, 87 Ariz. 295, 350 P. 2d 756 (1960); *State v. Aldrich*, 75 Ariz. 53, 251 P. 2d 653 (1952); *State v. Rothe*, 74 Ariz. 382, 249 P. 2d 946 (1952); *Gibbs v. State*, 37 Ariz. 273, 293 P. 976 (1930); *Fuller v. State*, 23 Ariz. 489, 205 P. 324 (1922); *State v. Small*, 20 Ariz. App. 530, 514 P. 2d 283 (1973); *State v. Ornelas*, 15 Ariz. App. 580, 490 P. 2d 25 (1971); *State v. Butler*, 9 Ariz. App. 162, 450 P. 2d 128 (1969); *State v. Cadena*, 9 Ariz. App. 369, 452 P. 2d 534 (1969); *State v. McMurtry*, 10 Ariz. App. 344, 458 P. 2d 964 (1969); *State v. Taylor*, 9 Ariz. App. 290, 451 P. 2d 648 (1969).

The jury has a right to know any fact which tends to show a witness is biased, prejudiced or hostile in passing on that witness' credibility. *State v. Ramos*, 108 Ariz. 36, 39, 492 P. 2d 697, 700 (1972).

Certainly, the fact of deliberate prosecutorial withholding of exculpatory evidence was admissible insofar as the Arizona courts have held that defense counsel should be allowed to examine witnesses to show that a conspiracy exists among prosecutorial personnel or agents to improperly obtain a conviction of the accused. *State v. Small*, 20 Ariz. App. 530, 534, 514 P. 2d 283, 287 (1973). Indeed, in some cases, the defense has been permitted to call the prosecuting attorney in an attempt to impeach witnesses. See, e.g., *State v. Little*, 87 Ariz. 295, 307, 390 P. 2d 756, 764 (1960).

Here, the prosecutor argued to the trial court that the State's case would be prejudiced by the revelation that the prosecution

had previously sought to secure a conviction by improper means. It cannot be disputed that the prosecution's willingness to adopt devious and improper tactics is highly relevant to the believability of its witnesses, and for that reason, Arizona permits such matters to be received in evidence. *Infra* at page 15.

Of course, any successful attack on the credibility of prosecution witnesses does damage to the State's case. In that sense, the prosecution's claim of prejudice here is like that of the prosecutor in *Scarborough v. Arizona*, 531 F.2d 959, 961 (9th Cir., 1976), where it was argued that an instruction to disregard his improper argument would have detracted from his argument. Here, the prosecution argued that the broader and more deceitful the prosecution's efforts to obtain conviction by improper means, the less admissible such matters would be, since in Petitioner's view, they would put the State on trial. If by prejudice, the Petitioner means loss of credibility, then certainly the establishment in evidence of its past misconduct would be "prejudicial," but it would not be improper.

The nature of the opening statement in this case is virtually identical to that in *State v. Burruell*, 98 Ariz. 37, 401 P. 2d 733 (1965). There defense counsel made an opening statement (the pertinent portion of which is quoted in 98 Ariz. at 41-42, 401 P. 2d at 736-737) in which he claimed that the defendant had been "framed" by the prosecution's star witness, an informer, who was paid to buy drugs from the defendant. Further, defense counsel maintained that the sheriff's department had reported to the prosecutor's office that the informant was guilty of other crimes, but the prosecutor chose not to prosecute the informant and instead used those charges to pressure him. Just as in the instant case, the *Burruell* prosecutor did not object during the opening statement, but thereafter moved for a mistrial on the grounds that the defense counsel's opening statement had done "irreparable harm" to the trial of the case, and that no instruction from the court could "wipe the slate clean." The mistrial motion was granted and the Arizona Supreme Court held the granting of the motion to have been error and to have barred retrial. Without reference to alternatives to a mistrial, the Arizona Supreme Court

held that for purposes of a mistrial motion, it must be assumed that the defense counsel produce the evidence set forth in his opening statement, and further held that the matters referred to would have been admissible. 98 Ariz. at 42 & 44, 401 P. 2d at 737-738.

Rule 272, 1956 Arizona Rules of Criminal Procedure, superceded Volume 17, Arizona Revised Statutes Annotated, which was obviously designed to protect defendants, *Hopt v. Utah*, 120 U.S. 430 (1887), does not make reference to the former trial improper where it had previously been referred to by the prosecutor. (App. 151 & 170.) *State v. Downey*, 104 Ariz. 375, 378-79, 453 P. 2d 521, 524-525 (1960). Cf. *Carsey v. United States*, 392 F.2d 810 (D.C. Cir., 1967). If the prosecutor here was objecting to a statement of the grounds upon which the second trial was granted, it is ironic. Earlier, in his own opening statement, the prosecutor was permitted, over objection, to say that, as a result of the magistrate's decision at Mr. Washington's preliminary hearing, based upon evidence there presented, the information against Mr. Washington was filed. (App. 169-170.)

Although defense counsel's remarks in his opening statements did not require consideration by the jury of the Arizona Supreme Court's Opinion, that too might have been permissible. A judgment in a criminal proceeding is receivable as evidence of a relevant fact in another criminal proceeding against the same person and is generally conclusive. *State v. Little*, 87 Ariz. 295, 304, 350 P. 2d 756, 762 (1960). See also, *State v. Davis*, 108 Ariz. 75, 492 P. 2d 1183 (1972); *Stewart v. Smith*, 73 Ariz. 70, 237 P. 2d 803 (1951). Cf. *Morrison v. Perry*, 167 Okl. 459, 30 P. 2d 670 (1934). And Cf. *State v. Cadena*, 9 Ariz. App. 369, 371-373, 452 P. 2d 534, 536-538 (1969); *State ex rel. DeConcini v. Superior Court*, 20 Ariz. App. 33, 35, 509 P. 2d 1070, 1072 (1973). Arizona Supreme Court Rule 48(c), 17 Arizona Revised Statutes Annotated, does not preclude the use of a memorandum decision, as in this case, to establish the law of the case or to conclusively establish a fact or ruling of law contested by the same parties and decided in that decision; it is

only a bar to the use of such decisions as legal precedent in other cases.

Not only was the defense's intent to use the prior prosecutorial misconduct revealed in the voir dire of the jury (Transcript of Defense Voir Dire 22); according to the prosecutor, he replaced the prosecutor from the first trial because it was believed the first prosecutor would have to testify regarding matters that formed the basis of the retrial. (App. 201.) Clearly, the statement that the defense intended to prove the prior misconduct therefore came as no surprise.

It is worth noting that the Petitioner in its briefs to the Arizona Supreme Court opposing retrial *never* claimed that the withholding of evidence was not deliberate; rather it claimed (as the Arizona Supreme Court Opinion reflects) that said evidence was not material to the defense and was withheld in good faith. The prosecutor admitted to the trial court "that the motion for a new trial was granted because the State failed to produce some evidence." (Transcript of Defense Voir Dire 35.) See also, Petitioner's Brief 37. (The jury "now had knowledge of the reason for the new trial.") In light of this and the Opinion of the Arizona Supreme Court (App. 7-15 & 35), Petitioner's argument (Petitioner's Brief 21-22, etc.) "that the [Arizona Supreme] Court did not concur with Washington that the suppression was the product of . . . deliberate or intentional conduct by the State" is pure sophistry and smoke screen.

C. Mr. Washington's Retrial is Barred by Double Jeopardy.

Since the remarks upon which the trial judge founded his grant of a mistrial were not error, the granting of a mistrial was improper and jeopardy attaches. *E.g.*, *State v. Burrnell*, 98 Ariz. 37, 401 P. 2d 733 (1965). There are no interests at stake countervailing Respondent's interest in having his trial completed by a particular tribunal, in avoiding the ordeal, anxiety and insecurity of another trial, and in avoiding the enhanced

possibility offered by repeated attempts to convict that, though innocent, he might be found guilty. *E.g.*, *Downum v. United States*, 372 U. S. 734, 736 (1963). Each of the foregoing U.S. 184, 187-188 (1957).

Defense counsel submits for the foregoing reasons that his reference to the decision of the Arizona Supreme Court concerning Respondent was proper. Assuming, *arguendo*, that it was error, the inquiry must focus upon whether the mistrial declaration was required by "manifest necessity" or "the ends of public justice." *E.g.*, *Illinois v. Somerville*, 410 U. S. 458 (1973); *United States v. Jorn*, 499 U. S. 470 (1971); *Downum v. United States*, 372 U. S. 734 (1963); *United States v. Perez*, 22 U.S. 579 (1824).

The Double Jeopardy Clause safeguards those accused in criminal proceedings from a variety of oppressive circumstances. A litany of some of the circumstances was provided by *Green v. United States*, 355 U. S. 184 (1957).

The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty. *Green v. United States*, 355 U.S. 184, 187-188 (1957).

The Double Jeopardy Clause also protects accused persons from the delays occasioned by repeated prosecutions. *United States v. Dinitz*, 424 U. S. 600, 608 (1976). Moreover, where a trial judge is asked to abort a trial, the Double Jeopardy Clause protects an accused person's "valued right" to have his trial completed by a particular tribunal, i.e., his option to go to the jury at hand and perhaps end the dispute then and there, once and for all, with an acquittal. *United States v. Dinitz*, 424 U. S. 600, 606 (1976); *Illinois v. Somerville*, 410 U. S. 458, 466 (1973); *United States v. Jorn*, 400 U. S. 470, 484-485 (1971); *Downum v. United States*, 372 U. S. 734, 736 (1963). Each of the foregoing safeguards was abridged by the declaration of a mistrial in Mr.

Washington's second trial.

Although any retrial probably results in additional embarrassment, ordeal, continuing anxiety, insecurity, and delay for an accused person, the anxiety, ordeal, and delay here were aggravated. Mr. Washington had the possibility of spending the rest of his life in prison hanging over his head, if convicted, and he had already spent more than four years imprisoned on a charge for which he had never been validly convicted. For him, the second trial was a beacon at the end of a long and torturous journey. He had already been severely punished, though he was presumed innocent, and care should have been taken to spare him further unnecessary punishment.

His pre-trial ordeal and continuing imprisonment, of course, fueled his interest and desire in going forward with the jury which had already been selected and heard evidence. But there was more than that impelling him to seek completion of his trial. For Mr. Washington, the chance of obtaining an acquittal was more than a mere hope. The prosecution had no eyewitnesses who identified him as being involved in the crime. A number of past and present prosecution witnesses, in fact, had either positively declared that Mr. Washington was not involved or had given descriptions of a suspect which were inconsistent with Mr. Washington's appearance. And Mr. Washington had a witness who could confirm his alibi.

The declaration of a mistrial prejudiced Mr. Washington, enhanced the possibility that, though innocent, he could be convicted, and was subject to prosecutorial manipulation. *E.g.*, *Downum v. United States*, 372 U. S. 734 (1963); *Carsey v. United States*, 392 F.2d 810 (D.C. Cir., 1967). The motion for mistrial was made by the prosecutor after he had been provided with a complete revelation of the defense's strategy, and the matters it intended to prove. It was made after the prosecutor had an opportunity to observe how the jurors were responding to his presentation of evidence. It was made after the prosecutor's threat of reprisal and smear tactics toward defense counsel (*e.g.* Transcript of Defense Voir Dire 55, App. 189-190) had been unsuccessful in dissuading the defense from impeaching the

prosecution's witnesses with evidence of its past attempts to improperly obtain a conviction of Mr. Washington. And it was made after the prosecutor learned of the defense's intention to produce the testimony of witnesses which the prosecutor had thought unavailable to the defense. (*E.g.*, App. 189, 194-196.)

Thus, the motion for mistrial allowed the prosecutor to abort a trial when he felt his case was weakening, and to utilize the time between trials to strengthen his case. Given the fact that one potential defense witness had died during the interval between the first and second trials (App. 175), and there was difficulty in locating other witnesses (App. 192), which was understandable where the crime occurred in a downtown flophouse hotel, only the prosecution could be expected to benefit and only the defense be prejudiced by an additional delay and the probable resulting inavailability of defense witnesses.

Here there are none of the factors present which warrant abandonment or relaxation of the manifest necessity standard. Mr. Washington's is not a case in which a mistrial was declared solely to benefit the accused, *Gori v. United States*, 367 U. S. 364 (1961), nor where the accused moved for a mistrial, *United States v. Dinitz*, 424 U.S. 600 (1976). This case does not involve an obvious procedural error rendering continuation of trial fruitless, like that in *Illinois v. Somerville*, 410 U. S. 458 (1973).

Application of the Double Jeopardy Clause involves a balancing of the accused person's interests against "the public's interest in fair trials designed to end in just judgments." *Illinois v. Somerville*, 410 U. S. 458, 463 (1973). Thus it is appropriate to ask whether an impartial verdict could have been reached in the trial that was ongoing. The evidence of prosecutorial misconduct was unquestionably admissible under Arizona law. The prosecutor had first opened the door to the existence of a prior trial. The trial was to be a lengthy one. Therefore, arguing that the single mention of the existence of an Arizona Supreme Court decision sanctioning retrial on the basis of prosecutorial withholding of evidence would irrevocably prejudice a jury and render it unable to reach an impartial verdict, strains credulity.

In such a situation, a meaningful determination of manifest necessity cannot be made without scrupulous consideration of available alternatives to declaring a mistrial, alternatives which would accommodate both the interests of the public and the accused individual. *United States v. Jorn*, 400 U. S. 470 (1971). The bulk of argument on the mistrial motion concerned admissibility of evidence, and the trial court made no statements indicating that it had considered the alternatives to mistrial mentioned by defense counsel or found them unrealistic or unworkable. The prosecutor argued without explanation that cautionary instructions were unsatisfactory alternatives (App. 200) at the time his mistrial motion was denied. Thus, the record gives every appearance that the motion for mistrial was ultimately granted because the trial court believed the opening statement remarks were error, without finding a manifest necessity for aborting the trial. (App. 32.) Indeed, the court's erratic behavior in first denying a mistrial and then granting it based upon virtually the same arguments suggests an arbitrary decision and a failure to follow Constitutional Double Jeopardy standards. *United States v. Jorn*, 400 U. S. 470 (1971).

D. Where a Mistrial is Requested Over the Defendant's Objection and is Asserted to be Occasioned by Matters Causing Jury Prejudice, this Court Should Require the Trial Judge to Make a Record of Consideration of Alternatives to Retrial.

Where a mistrial is requested over the defendant's objection and is asserted to be occasioned by matters causing jury prejudice, the mistrial cannot be manifestly necessary if there are workable alternatives which will provide an impartial verdict. And a court that ignores or fails to consider such alternatives abuses its discretion. *United States v. Jorn*, 400 U. S. 470 (1971). When Constitutional rights turn on the resolution of a factual dispute, Federal courts are required to make an independent examination of the evidence in the record. *E.g.*,

Brookhart v. Janis, 384 U. S. 1, 4 n. 4 (1966); *Edwards v. South Carolina*, 372 U. S. 229, 235 (1963); *Blackburn v. Alabama*, 361 U. S. 199, 205 n. 5 (1960).

How is an appellate court to determine whether a trial court considered the "manifest necessity" of a mistrial when it does not state any findings or remarks indicating consideration of alternatives? Petitioner suggests that an appellate court speculate regarding the trial court's cognitive processes and infer fair consideration of alternatives solely because they have been mentioned by counsel. (Petitioner's Brief 114-115.) Obviously, it would be just as reasonable to infer from the trial court's silence regarding alternatives that it gave no consideration to the alternatives mentioned or rejected them for arbitrary or frivolous reasons.

A simpler and eminently fairer approach would be to require trial courts to make their consideration of alternatives to declaring a mistrial explicit in the record. A recent commentator argues persuasively:

When mistrial has been declared, a court examining a double jeopardy claim must assure itself that the defense had an opportunity to air its views, that these views were *considered*, and that the trial judge reached a reasoned decision. A trial judge who rejects an alternative for no reason or for a patently frivolous reason will not have provided the minimal attention to double jeopardy interests that is always appropriate, and retrial should be barred. Schulhofer, "Jeopardy and Mistrials." 125 U. Pa. L. Rev. 449, 517 (1977).

Once a trial judge's consideration of alternatives is explicit in the record, there is no need to speculate. An appellate court can then give due deference to the trial judge's first-hand opportunity to observe without abdicating its own responsibility to maintain the guarantee of the Double Jeopardy Clause. Thus, with a trial court's determination of "manifest necessity" opened to the light of examination, it can be presumed proper unless the record speaks loudly and decisively to the contrary.

II.

THE ISSUE OF WHETHER DEFENSE COUNSEL DELIBERATELY PROVOKED A MISTRIAL IS NOT PROPERLY BEFORE THIS COURT, IS NOT SUPPORTED BY THE RECORD, AND DEFENSE INVOLVEMENT IN THE GROUNDS FOR MISTRIAL HEREIN SHOULD NOT OVERRIDE THE DEFENDANT'S DOUBLE JEOPARDY INTERESTS IN THIS CASE.

A. The Issue of Deliberate Defense Provocation of a Mistrial Cannot be Raised for the First Time in This Court.

The Petitioner's Petition for Writ of Certiorari should be dismissed as improvidently granted or, in the alternative, the Petitioner's fourth question presented should be denied consideration, for the reason that said question raises an issue not heretofore raised before any court. In addition to the fact that the allegation that defense counsel in this case acted in bad faith or intentionally provoked a mistrial is untrue and scurrilous, notably that issue was never raised or claimed in the Arizona Superior Court, the Arizona Supreme Court, the United States District Court or the United States Court of Appeals.

In the United States Court of Appeals, the Petitioner presented two issues: (1) whether a trial judge must make findings of manifest necessity or irrevocable jury bias when declaring a mistrial, to avoid claims of double jeopardy, and (2) whether the District Court should have permitted the State to reopen its evidence and introduce "testimony" of the trial judge that his ruling was based upon a finding of manifest necessity. (Appellee's Opening Brief at 18.) Although Petitioner's arguments to the United States Court of Appeals for the Ninth Circuit contained venal criticism of defense counsel's representation of his client, the issue here raised was not submitted in that or any other court. The Petitioner came closest to raising it for

the first time below when the following two sentences were inserted in widely separated portions of the Court of Appeals brief:

While it may at times be difficult for a judge to distinguish excessive zeal or incompetence from intentional precipitation of mistrial, here the anomaly must give way to defense counsel knowingly (or should have known he was) bringing about the mistrial ruling. (Appellee's Opening Brief at 48.)

Washington, through the bad-faith conduct of his counsel, cannot bait the court and the prosecutor into a mistrial ruling and then hop under the Constitution for protection. (Appellee's Opening Brief at 66.)

In Appellant's Reply Brief at 22, Respondent noted that the foregoing accusations "were never made in any of the myriad of previous Court proceedings," and declined to dignify them by a response unless the Court of Appeals requested a response. No response was requested.

Matters raised for the first time before this Court are generally not considered. *E.g.*, *Tacon v. Arizona*, 410 U. S. 351 (1973); *United States v. Estate of Donnelly*, 397 U.S. 286, 295 n. 5 (1970); *Cardinale v. Louisiana*, 394 U. S. 437 (1969); *Lawn v. United States*, 355 U. S. 339, 362-363 n. 16 (1958).

B. Defense Provocation of Mistrial is Not Supported by the Record.

There was no intentional provocation of a mistrial by defense counsel in this case. A party should not be permitted to use unfounded vilification of a party's attorney as an entree to this Court. Indeed, the very length and adversary nature of the argument over Petitioner's motion for mistrial gives the lie to the allegation that Respondent's counsel deliberately sought a mistrial. Similarly, the provoking of a mistrial would have been reason for the court to invoke its contempt powers and discipline the attorney responsible. *E.g.*, *Weiss v. Burr*, 484 F.2d 973, 982 (9th Cir., 1973), *cert. denied*, 414 U. S. 1161 (1974). Moreover, in view of the weakness of the prosecutor's case and the

availability of substantial exculpatory evidence, the defense confronted the strong possibility of an acquittal. Provocation of a mistrial would have been contrary to Mr. Washington's interests.

The argument that the defense in this case provoked a mistrial, in addition to being improper and untrue, is an insidious invitation to myopic examination of this case. It is as if one judged who was at fault in causing a fist fight by noting who struck the last blow, without reference to what led up to that event. In this case, the prosecutor provoked the remarks he later complained of. Over objection, he disclosed to the jury the existence of two prior proceedings at which testimony was taken four years before the instant trial. (App. 151.) This should have been regarded as error in view of Rule 314, 1956 Arizona Rules of Criminal Procedure, superceded Volume 17, Arizona Revised Statutes Annotated. ("When a new trial is granted, the new trial shall proceed in all respects as if no former trial had been had.") *Compare, State v. Downey*, 104 Ariz. 375, 378-379, 453 P. 2d 521, 524-525 (1969) (mention of prior proceedings not reversible error where defense counsel referred to them first); *People v. Kessler*, 221 Cal. App. 2d 187, 192, 34 Cal. Rptr. 433, 436 (1963) (mention and calling of probation officer as witness indirectly referred to former trial and was grounds for reversal).

The prosecutor first introduced the jurors to the fact of retrial, at the least by a strong inference. He sought to use that fact to bolster the credibility of his witnesses, arguing to the jury that the four year time lapse should be viewed as an explanation for the inconsistent statements of the State's witnesses. The defense responded by conceding the retrial and utilizing the matters which the prosecutor admitted had caused the retrial (Transcript of Defense Voir Dire 35), the suppressed inconsistent, but exculpatory statements, to attack the credibility of the prosecution's witnesses.

C. Defense Involvement in the Asserted Grounds for Mistrial Does Not Warrant a Deviation from the Manifest Necessity Standard.

Petitioner has urged that the manifest necessity standard be abandoned here because the mistrial declaration was based on alleged defense misconduct. No basis exists in this case for departing from the standard of manifest necessity. Where a mistrial is based upon some asserted defense misconduct, the courts have nevertheless applied the manifest necessity standard. *E.g., United States v. Tinney*, 473 F.2d 1084 (3rd Cir.), cert. denied, 412 U. S. 928 (1973); *Carsey v. United States*, 392 F.2d 810 (D.C. Cir., 1967); *Espinoza v. District Court*, 180 Colo. 391, 506 P. 2d 131 (1973); *United States v. Bristol*, 325 A. 2d 183 (D.C. Cir., 1974); *State v. Sedillo*, 88 N. M. 240, 539 P. 2d 630 (1975); *Commonwealth ex rel. Riddle v. Anderson*, 227 Pa. Super. Ct. 68, 323 A. 2d 115 (1974).

Such cases recognize the real world where imperfect humanity, difference of opinion, uncertainty or error regarding the law, and courtroom zeal and passion are more likely to result in errors than deliberately provocative conduct. They also recognize that the public, and not just accused persons, has an interest in the speedy, economical and final resolution of criminal cases, and require that alternatives to retrial be utilized where practical.

Were the manifest necessity standard not utilized in matters of asserted defense misconduct, the prosecutor could obtain mistrials virtually at will. He could substitute motions for mistrial where a simple objection would normally be appropriate. Such a result would occasion danger of prosecutorial manipulation and disruption of the criminal justice system. Errors for which an accused person would not be entitled to mistrial, would constitute mistrial grounds on the prosecution's motion. Thus, the threat of an automatic mistrial on the prosecutor's motion would stand as a weapon by which he could control the manner of presentation of the defense case in the absence of the manifest necessity standard.

CONCLUSION

For the reasons expressed herein, it is respectfully urged that the judgment of the court below be affirmed.

Respectfully submitted this 24th day of August, 1977.

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Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 76-1168

STATE OF ARIZONA,
RICHARD BOYKIN, SHERIFF,
PIMA COUNTY, ARIZONA,

Petitioner,

vs.

GEORGE WASHINGTON, JR.,

Respondent.

On Writ of Certiorari to the United States

Court of Appeals for the

Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

REFERENCES IN PETITIONER'S REPLY BRIEF

All ellipses and abbreviations employed in the Petitioner's Brief, and explained therein at pp. 1-4, have been adopted in the Petitioner's Reply Brief, with the following additions:

(a) The Brief for the Petitioner, filed with the Supreme Court of the United States on June 20, 1977, will be referred to as "Pet. Br." when appropriate;

(b) The Brief for the Respondent filed with the Supreme Court of the United States on August 17, 1977, will be referred to as "Resp. Br." when appropriate; and

(c) All references made to the Superior Court Transcript of the Jury Trial of January 8, 1975 (not Mr. Bolding's Voir Dire of the Jury Panel, but

instead the transcript of the entire trial) will be referred to as the "Major Jury Transcript".

REFERENCE TO THE OPINIONS BELOW IN
THE RESPONDENT'S BRIEF

Pursuant to U. S. Sup. Ct. Rule 23(1) (a), 28 U.S.C.A., the Respondent George Washington, Jr. lists as one of two opinions delivered in the courts below the Opinion of the Arizona Supreme Court, filed June 20, 1974 but unreported. [Resp. Br. 1.] Washington incorrectly represents both the chronological placement and legal nomenclature of this decision. Because he refers to this decision as an Opinion throughout his Brief to this Court, and because of the relative importance he gives to this decision therein, the State of Arizona wishes to correct this error.

First, the decision to which Washington refers was not delivered in the stream of appellate process which brought

this case to the Supreme Court, and is therefore not an opinion of the courts below within the context of the above-mentioned rule and is not subject to this Court's consideration for affirmance or reversal. [See Pet. Br., "Statement of Facts", pp. 18-22.] But more importantly, Washington mislabels this decision in his Brief as bona fide Opinion of the Arizona Supreme Court, thereby giving it the stature which an opinion from a highest state court is entitled.

In truth and in fact, the Arizona Supreme Court saw fit not to hand down an Opinion, but rather a Memorandum decision, and labeled it as such. [App. 7.] The difference between the two is that while bona fide Opinions are legal precedent, Memorandum decisions are not, and cannot be cited as such in any court. [See Pet. Br., "Relevant Constitutional

Provisions and Arizona Rules", p.11, for 17A A.R.S. Sup. Ct. Rules, rule 48(c) which codifies this prohibition.] The Ninth Circuit acknowledged and set out this prohibition in its Opinion. Arizona v. Washington, 546 F.2d 829, 832, n.2 (9th Cir. 1976).

For correction, the Memorandum Decision is represented as an Arizona Supreme Court Opinion on pages 1, 4 (n.2), 18, and 19 of Washington's Brief.

REPLY TO
JURISDICTIONAL STATEMENT

Washington urges that the State's petition for writ of certiorari was not timely filed because it was lodged with the Clerk of this Court more than thirty days after entry of Judgment of the Ninth Circuit, and cites for authority U. S. Sup. Ct. Rule 22(2), 28 U.S.C.A. [Resp. Br. 1-2.]

Rule 22(2) contemplates filing a petition for writ of certiorari to review the judgment of a court of appeals in a criminal case. While Washington is charged by the State of Arizona with the crime of murder, he has entered the federal court system on a writ of habeas corpus which is not a criminal proceeding. It is the granting of this writ in the District Court, and the affirming of

the District Court's decision by the Ninth Circuit that is before this Court on review. A habeas corpus proceeding is a civil remedy for enforcement of a person's civil right to personal liberty. Stewart v. Bishop, 403 F.2d 674, 677 (8th Cir. 1968); U.S. v. Masters, 484 F.2d 1251, 1253 (10th Cir. 1973). Therefore, time limits set forth in Rule 22(2) do not obtain in the case at bar.

Rule 22(3) provides that a petition for writ of certiorari "in all other cases" will be timely filed if lodged with the Court "within the time prescribed by law." 28 U.S.C.A. §2101(c) directs that a writ of certiorari which brings a judgment or decree in a civil action before the Supreme Court for review must be applied for within ninety days after the entry of judgment or decree. The judgment of the Ninth Circuit

was entered January 20, 1977. The State's petition for writ of certiorari was filed with the Clerk of this Court February 23, 1977, thirty-four days after entry of judgment.

Therefore, the State's petition for writ of certiorari was timely filed.

REPLY TO RESPONDENT'S

STATEMENT OF THE CASE

Notwithstanding that Washington has placed differing emphasis on several of the events of the case at bar, his version of the Statement of the Case does not differ significantly from the State's presentation. However, the State deems it necessary, pursuant to U. S. Sup. Ct. Rule 40(3) and (4), 28 U.S.C.A., to correct the following inaccuracies and omissions in Washington's version.

First, in his Brief to this Court, Washington talks about the first motion for mistrial made by Mr. Butler, the County Attorney trying the case, following his counsel's opening statement to the jury:

"That afternoon, the prosecutor moved for a mistrial on the following grounds: that

defense counsel used some argument in his opening statement; that he, the prosecutor, didn't believe the defense would be able to produce witnesses referred to; that the defense shouldn't be allowed to put on evidence of past prosecutorial misconduct in the case; and that, if the motion for mistrial were not granted" (Emphasis added.)

[Resp. Br. 7.]

No where in the transcript of Mr. Butler's first (or any) motion for mistrial does he refer to or argue against admission of evidence of "past prosecutorial misconduct", and it is inaccurate to infer that he does. This is a term long coined by Washington, not by the Courts,

and not by Mr. Butler. What Mr. Butler said to the trial court, and what Washington is referring to, is as follows:

"Mr. Bolding does not want to try George Washington, he wants to try what happened four years ago in the handling of this case by the County Attorney's office. That issue has been decided by the courts. That issue should not be tried at this time, but Mr. Bolding has done everything he can to throw it in "

[App. 190.]

Secondly, Washington has omitted from his Brief a material portion of his counsel's opening statement. The following is that part of defense counsel's statement which led to Mr. Butler's motion for mistrial on the grounds of jury

prejudice with the omitted part in emphasis:

"You will hear testimony that notwithstanding the fact we had a trial in May of 1971 in this matter, that the prosecutor hid those statements and didn't give those to the lawyer for George, saying the man was Spanish speaking, didn't give those statements at all, hid them. Not this prosecutor. Prosecutor who has been taken off this case. [App. 180-181.]

. . . .

You will hear that that evidence was suppressed and hidden by the prosecutor in that case. You will hear that that evidence was purposely withheld. You will hear that be-

cause of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case. [App. 184.]" [Resp. Br. 7.]

Finally, where Washington explains defense counsel's retort to Mr. Butler's first motion for mistrial, specifically to the argument that defense counsel had told the jury about witnesses' testimony they were not going to hear. [Resp. Br. 8], Washington tells this Court that defense counsel "avowed [to the trial court] that though a continuance had been unsuccessfully sought to allow additional time to locate witnesses, he believed all the witnesses referred to would be located and called." The State wishes to dispell any inference cast that defense counsel was not given time to locate

witnesses before trial. On December 16, 1974, twenty-four days prior to the day defense counsel was making his avowal to the trial judge, a continuance had been asked for and granted. Although defense counsel had, on the first day scheduled for trial, asked for a continuance which was not granted, he had been given four weeks after his Motion to Dismiss was denied¹ to prepare for trial.

¹As set forth in the State's Brief [Pet. Br. 18-23], on June 20, 1974, the Arizona Supreme Court affirmed the trial court's granting of a new trial on the grounds of violation of due process and newly discovered evidence, and a new trial was set for August 21, 1974. In September, after that trial date had been vacated, a new trial date was set for November 19, 1974. Defense counsel filed

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a Motion to Dismiss and a Motion to Produce in early November 1974, and at a hearing on the Motion to Produce, a continuance was granted to December 18, 1974. On December 13, 1974, the Motion to Dismiss was denied. On December 16, 1974, a continuance was granted to January 6, 1975, when defense counsel again asked for a continuance which was denied.

REPLY TO RESPONDENT'S ARGUMENTS

Respondent's first argument [Resp. Br. 13-24] which, inter alia, debates the meaning of the Ninth Circuit's Opinion, is grounded upon his own interpretative statement of the questions presented for review in the State's petition for writ of certiorari. The State objects to Washington's reframed questions as an inaccurate restatement of those presented by the State, specifically his first question which is illogically structured. Therefore, the State will attempt to respond to Washington's arguments in his Brief within the structure of the questions presented to this Court for review and as set forth in the State's Brief [Pet. Br. 13] pursuant to U. S. Sup. Ct. Rule 40(1)(d)(1), 28 U.S.C.A.

THE OPINION OF THE NINTH CIRCUIT
HOLDS THAT A TRIAL JUDGE MUST AR-
TICULATE HIS REASON(S) FOR GRANT-
ING A MISTRIAL ON THE RECORD OR
MUST INDICATE THAT HE CONSIDERED
ALTERNATIVES TO MISTRIAL ON THE
RECORD.

Washington's first topical heading states that the Ninth Circuit Opinion did not require a trial court to make specific findings of "manifest necessity" before granting a mistrial. [Resp. Br. 13.] The State agrees with Washington that the Ninth Circuit did not require those specific words uttered before granting a mistrial. However, his argument thereafter cuts much deeper and postulates that the Ninth Circuit does not require a trial judge to make any findings before

granting a mistrial. [Resp. Br. 13-14.] The State strongly opposes this interpretation given to the Ninth Circuit's Opinion.

In his Brief, Washington appears to disregard the context in which that Court stated "[w]e do not hold that these words are talismanic" [546 F.2d at 832], and excises this sentence from the Opinion to bolster his argument. "[T]hese words" which the Court holds not talismanic are "manifest necessity" and "ends of public justice", the cornerstones of the Perez² doctrine, not findings of any kind, as Washington argues. What they said follows:

"In the absence of any finding
by the trial court or any
indication that the court con-

² United States v. Perez, 22 U.S.
(9 Wheat.) 579, 6 L.Ed. 165 (1824).

sidered the efficacy of alternatives, such as an appropriate cautionary instruction to the jury, we must conclude that neither of the tests of Perez ('manifest necessity' or 'ends of public justice') has been met. We do not hold that these words are talismanic; we hold only that this particular record fails to reveal a 'scrupulous exercise of judicial discretion,' and that"

[Id.]

The State maintains that the Ninth Circuit does require a trial court to make a finding on the record of the legal reason why he declared a mistrial. The Opinion is replete with indications thereof, but one particular passage is unquestionable in its mandate to trial judges:

"However, we decline to imply from this impropriety [remarks made by defense counsel in his opening statement] that the jury was prevented from arriving at a fair and impartial verdict. If this was the case, the trial judge should have so found.³ He at no time, however, indicates his reason(s) why he granted the mistrial." (Emphasis added.)

[Id.]

According to the Ninth Circuit, it is now requisite in a mistrial circumstance that

³The State propounds its second question to this Court for review [See Pet. Br. 13, Questions Presented for Review] based on this directive, and that of Circuit Judge Merrill, infra at p.22 .

a trial judge make either a specific finding on the record reflecting his reason(s) why he granted a mistrial (such as in the case at bar "the jury is no longer able to reach an impartial verdict"), or some verbal indication on the record that he considered alternatives to mistrial. If neither a finding nor consideration of alternatives is found in the record, then a "'scrupulous exercise of judicial discretion'" [546 F.2d at 832] has not been exercised and the double jeopardy clause precludes retrial of the criminal defendant.

The concurring opinion of Circuit Judges Merrill and Anderson offers corroboration for the State's construction of the Ninth Circuit's holding. In discussing the arguments of counsel to the trial judge, Judge Merrill decides:

"While manifest necessity was also argued on this occasion, absent findings that manifest necessity existed, it is quite possible that the grant of mistrial was based on the fact that the impropriety of counsel's conduct had been established without reaching the question whether there could, nevertheless, be a fair trial." (Emphasis added.)

[546 F.2d at 833.]

The Ninth Circuit seems possessed with the idea that since arguments of counsel centered around the impropriety of defense counsel's remarks, and equal time and effort were not given by counsel to arguing that jury prejudice, and therefore manifest necessity, existed for a mistrial declaration, the trial judge

most probably declared a mistrial because he concluded the remarks were improper, not because he concluded they had prejudiced the jury to the extent that an impartial verdict could no longer be reached.

Their rationale for this theory assumes a sequence of events which seems to place the finding of improper conduct before the finding of jury prejudice: that Judge Buchanan would first have determined the impropriety, or inadmissibility, of defense counsel's remarks made to the jury, then, would have determined the prejudicial effect of those remarks; that since there was no extended colloquy on the record between judge and counsel concerning jury prejudice, then "quite possibly" Judge Buchanan did not go on to reach the question "whether there could, nevertheless, be a fair trial." [Id.] The

Ninth Circuit ignores the likelihood of a reverse sequence of events--that Judge Buchanan had already concluded, solely from observing all that had transpired, that there existed the possibility,⁴ or probability, of a biased panel; that

⁴See Pet. Br. 111-112 where the State cites Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949), United States ex. rel. Hetenyi v. Wilkins, 348 F.2d 844 (2nd Cir. 1964), United States ex rel. Stewart v. Hewitt, 517 F.2d 996 3rd Cir. 1975), United States v. Pridgeon, 462 F.2d 1094 (5th Cir. 1972), and Whitfield v. Warden of Maryland House of Correction, 486 F.2d 1118 (4th Cir. 1973) for long-recognized law that a trial judge does not abuse his judicial discretion by declaring a mistrial when there exists a reasonable possibility that the jury might be biased.

since the State was asking for a mistrial based on jury prejudice⁵ the issue to be resolved was whether or not defense counsel's remarks were nonetheless legally proper.

It is well settled law that if

⁵See App. 189; 190; 207, where Mr. Butler explains to Judge Buchanan "What [defense counsel] wants that jury to do is say, 'Look, this guy has spent that long a time in prison because the prosecutor is guilty of misconduct' and so, 'You should [sic] find him guilty now . ' The only reason he can want that in is to get the jury so mad at the State . . ."; 222; 223; 227; 233, where Mr. Butler argues "It's the opinion of the State that no curative instruction given by the Court could in this case adequately cure

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defense counsel makes remarks in his opening statement concerning evidence that is admissible, a trial judge has no legal basis to declare a mistrial just because the remarks are prejudicial to the State's case. However, if opening remarks are made to the jury

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the damage that has been done by Mr. Bolding. . . . The State, the position of the State has been so prejudiced by his illegal and improper argument that . . .": 241; 253; 268; 269-270, where Mr. Butler further stated "I think this jury cannot fairly sit and decide this case knowing that and I don't think any instruction is going to cure that. . . we have, I think, a situation where, because of the improper argument, the State cannot obtain a fair trial"; and 271.

concerning evidence that is not admissible, the trial judge has every right to declare a mistrial if there is a reasonable possibility that the jury might be biased from such remarks so that a fair trial is no longer possible. United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed. 2d 267 (1976), concurring opinion; State v. Burruell, 98 Ariz. 37, 401 P.2d 733 (1965).⁶ Judge Buchanan acted responsibly in soliciting and listening

⁶In State v. Burruell, even though defense counsel, in his opening statement, made remarks that were severely damaging to the State's case, because the statements concerned evidence that was held to be admissible (unlike the facts in the case at bar), the Arizona Supreme Court held that the State's motion for mistrial should have been denied.

to argument of counsel on the issue of the propriety of defense counsel's remarks, for the determination of that issue was critical to his valid declaration of mistrial.

The State argues that no such limited implications should be drawn from the record as has been done by the Ninth Circuit. It is untenable to conclude Judge Buchanan quite possibly failed to reach the question of whether or not the jury's mind had been tainted by defense counsel's prejudicial remarks. If Judge Buchanan did not consider jury prejudice as a basis for declaring the mistrial, as the Ninth Circuit speculates he did not, then what meaning is to be given to his early statement--

"I was a little concerned with the poisoning of the panel, that someone might blurt out

[the reason for the new trial]

. . . ."

[Exh. 1 (Superior Court Transcript of the Jury Trial of January 8, 1975, Mr. Bolding's Voir Dire of the Jury Panel), p.35.]

Judge Buchanan, from his first realization that defense counsel planned to prove "that there was evidence hidden from George at the last trial" [Exh. 1, p.22], was responsive to the possibility of jury prejudice developing in Washington's second trial. When the possibility was substantially increased by defense counsel's opening statement, he responded by declaring a mistrial, but only after assuring himself that defense counsel was not entitled to present the evidence to prove his accusations that the State purposely withheld evidence from Washing-

ton and the Arizona Supreme Court granted a new trial because of that misconduct. Once the determination of inadmissibility was made, Judge Buchanan felt there existed the manifest need to declare a mistrial.

This Supreme Court held, not five years ago, that a mistrial declared in an Illinois state court "met the 'manifest necessity' standard of [its] cases since the trial could reasonably have concluded that the 'ends of public justice' " would have been defeated by allowing the trial to continue. (Emphasis added.) Illinois v. Somerville, 410 U.S. 458, 459, 93 S.Ct. 1066, 1068, 35 L.Ed. 2d 425 (1973). It would confound common sense and the record itself to state that from a review of all the circumstances Judge Buchanan could not reasonably have declared a mistrial be-

cause the remarks were prejudicial. Nevertheless, the Ninth Circuit held that he did not, evidently inattentive to the Somerville decision.⁷ In its place was substituted their own standard:

If

NO FINDINGS BY THE TRIAL JUDGE ON THE RECORD

or

NO INDICATIONS BY THE TRIAL JUDGE THAT HE

CONSIDERED ALTERNATIVES ON THE RECORD

then

NO SCRUPULOUS EXERCISE OF JUDICIAL DISCRETION

and, therefore,

ABUSE OF JUDICIAL DISCRETION AND

VIOLATION OF THE DOUBLE JEOPARDY CLAUSE.

⁷See Pet. Br. 96-97 for the State's argument that the Ninth Circuit further disregarded Somerville by excising portions of the Jorn Opinion to support their decision in the case at bar.

The rigid formula which the Ninth Circuit has propounded for analysis of judicial discretion seems in direct conflict with the majority decision in Somerville which cautioned against such mechanical devices:

"[The Perez] formulation, consistently adhered to by this Court in subsequent decisions, abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial." 410 U.S. at 462, 93 S.Ct. at 1069.

It is this holding of the Ninth Circuit that the State has petitioned this Court to review, as it is contrary to the established law of this Court, and

of the Second, Third, Fourth, and Fifth Circuit Courts of Appeals.

II

THE REMARKS MADE BY WASHINGTON'S
DEFENSE COUNSEL DURING HIS OPEN-
ING STATEMENT TO THE JURY WERE
IMPROPER UNDER ARIZONA LAW.

Washington argues in his Brief that his defense counsel's remarks during the opening statement to the jury were proper. [Resp. Br. 15-19.] In support of this argument he correctly states that Arizona permits wide latitude in cross-examination and impeachment of witnesses. But his further argument reveals inconsistencies and inaccuracies in stating both the law and the facts of the case at bar.

Defense counsel's opening remarks concerning the State's suppression, hiding and purposeful withholding of evidence from Washington's lawyers, and that such "misconduct" occasioned the Arizona Supreme Court to grant⁸ a new trial, have been held improper not only by the trial court as Washington states, but by the federal district court [App. 128] and by the Ninth Circuit [546 F.2d at 832].

⁸The State takes issue with the constant statement of Washington, both to the jury and to the federal appellate courts, that the Arizona Supreme Court "granted" a new trial to Washington. The Arizona Supreme Court affirmed the lower trial court's ruling that a new trial was warranted. The significance of this distinction becomes apparent with the following statement from the Memorandum de-

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Washington argues that the evidence his counsel told the jury he would present was admissible, and, therefore, that his remarks were totally proper.

The State has argued in its Brief to this Court [Pet. Br. 110, n.21] as it did to the Ninth Circuit [Appellee's Opening Brief, pp. 55-59] that the evidence was not legally admissible. What

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cision itself:

"It is well settled that an appellate court will not interfere with matters so peculiarly within the knowledge of the trial court unless an abuse of discretion existed. State v. Byrd, 94 Ariz. 139, 383 P.2d 555 (1963.)"

[App. 14.]

happened in Washington's first trial is irrelevant and immaterial to the guilt or innocence of Washington, as is the holding of the Arizona Supreme Court. Further, 17A A.R.S. Sup. Ct. Rules, rule 48(c) precludes the use of a Memorandum decision for such purposes as Washington intended.

But the statements that defense counsel made were improper for another reason. Washington's counsel knew they were untrue, and incapable of proof. The County Attorney's office did not purposely withhold evidence from Washington at his first trial, and although Washington argued to the Arizona Supreme Court that the County Attorney's office was guilty of intentional misconduct, the Arizona Supreme Court declined to so hold. That Court did not state that the

County Attorney was guilty of "misconduct", intentional or otherwise. That Court affirmed the lower trial court's ruling that a new trial was warranted on the grounds of a violation of due process and newly discovered evidence. As much as Washington would wish that finding, it does not exist.

Washington maintains in his Brief that "defense counsel's remarks in his opening statements did not require consideration by the jury of the Arizona Supreme Court Opinion".⁹ The State is perplexed by this assertion. In order to prove that the Arizona Supreme Court granted a new trial for misconduct of the County Attorney in hiding, suppressing, and purposely withholding evidence from Washington during the first trial, the

⁹ Memorandum Decision.

Memorandum decision would have to be introduced for the jury's consideration. Barring that, defense counsel could not prove for what reason the new trial was granted.¹⁰

Washington further contends that in any event the Arizona Supreme Court decision might have been admissible on the basis of a "judgment". Evidently, Washington urges this Court to equate this Memorandum decision, which the Arizona Supreme Court Rules do not allow as

¹⁰Unless he planned alternatively, as he stated to Judge Buchanan, to "subpoena the author of that opinion as well as the other members of the Supreme Court to testify in this regard" [App. 206] which is an evidentiary impossibility.

legal precedent, with a judgment of guilty or innocent in a criminal proceeding. The two are dissimilar in fact and in law.

The State deems it essential to again correct some significant inaccuracies in Washington's Brief. Therein, Washington states that "the prosecutor argued to the trial court that the State's case would be prejudiced by the revelation that the prosecution had previously sought to secure a conviction by improper means." [Resp. Br. 16-17.] No where in the transcript of the trial can such an argument be found. He further states that "the prosecution argued the broader and more deceitful the prosecutor's efforts to obtain a conviction by improper means, the less admissible such matters would be since in the Petitioner's mind they would put the State on trial." [Resp. Br. 17.]

This is utter fabrication. No such argument has ever been made by the State.

III

WASHINGTON IS NOT BEING HELD
IN VIOLATION OF THE FIFTH
AMENDMENT DOUBLE JEOPARDY
CLAUSE.

The State has argued in its Brief to this Court the many reasons why jeopardy should not attach in the case at bar, and has cited for authority the pertinent federal cases that uphold the State's position. In Washington's argument that his retrial is barred by the double jeopardy clause [Resp. Br. 19-23], there is little if any analysis of the double jeopardy cases cited for support

of his position that need retort beyond what has been said in the State's Brief. Therefore, there will be no reiteration of that argument here. However, there are several cases mischaracterized by Washington, along with the conclusionary and factually unsubstantiated statements in his argument, and the State will respond to those in order.

For the precept that the double jeopardy clause protects an accused's "valued right" to have his trial completed by a particular tribunal, i.e., "his option to go to the jury at hand and perhaps end the dispute then and there, once and for all, with an acquittal" [Resp. Br. 20], which precept forms the backbone of his argument, Washington cites as authority therefor the Supreme Court cases of United States v. Dinitz,

supra, Illinois v. Somerville, supra, United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed. 2d 543 (1971) and Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed. 2d 100 (1963). While it is true that both the Dinitz and Somerville decisions reiterate the historical holdings of cases as part of the developing rationale for their own holdings, it can hardly be said that those two cases stand for the foregoing proposition as espoused by Washington. The language he cites is from the holding of United States v. Jorn [400 U.S. at 484, 91 S.Ct. at 557], which case makes the right to a trial before a particular tribunal of utmost importance to a defendant, and which case the Ninth Circuit incorrectly adopted as precedent for the ruling in the case at bar. [See the

State's applicable argument in Pet. Br. 94-107.]

While the defendant's valued right to go to a particular tribunal for his verdict has always been considered crucial in the balance of interests before a mistrial is declared [Wade v. Hunter, supra, 336 U.S. at 688-689, 69 S.Ct. at 837], that "valued right" must in some instances be subordinated to the public interest in fair trials designed to end in just judgments. [Id.] Washington acknowledges this [Resp. Br. 22], but maintains that the single mention of the Arizona Supreme Court decision could not possibly have prejudiced his jury so that an impartial verdict could not be reached. It is relevant to note here that after urging in this Brief that his counsel's opening statement to the jury contained the claims

"that evidence would establish (1) that the prosecution purposely withheld evidence from the defense, and (2) that because of such misconduct the Arizona Supreme Court had granted a new trial in this case" [Resp. Br. 15],

suddenly Washington downplays what was actually said to the jury to a "prosecutorial withholding of evidence." [Resp. Br. 22.] What was said by defense counsel (and more than a "single mention") should be clear at this point--that a prosecutor in Washington's first trial had hidden, suppressed, and purposely withheld evidence from Washington, that that prosecutor had been taken off the case, and that the Arizona Supreme Court granted a new trial because of that misconduct. [App. 180-181, 184.] Couple that series of

accusations in defense counsel's opening statement with his prior declaration to the jury in voir dire that evidence had been hidden from Washington [Exh. 1, p. 22], and with defense counsel's many and repeated references to "the prior trial"¹¹ and to Washington's prior conviction [Exh 1, pp. 27-28, App 182, 184], the question "whether an impartial verdict would have been reached in the trial that

¹¹ In voir dire of the prospective jurors, when defense counsel felt compelled to explain Mr. Butler's mention of "prior proceedings" as a "previous trial" (Exh. 1, p. 22, Pet. Br. 24), defense counsel asked the jurors, as the Ninth Circuit noted [546 F.2d at 831], to disregard this fact. "Can you lay that aside, can you not worry about that, think about
(Continued)

was ongoing" [Resp. Br. 22] seems to answer itself. From all the statements that the jury heard, how could they give a fair trial to either side? The answer is, as Judge Buchanan must have realized, they could not.

Washington argues to this Court how valued his right had become to take his case to his second jury [Resp. Br. 21-23]--reciting his anxiety and insecu-

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this trial today and for the next 10 days? Would you do that, and not worry about the fact that we are in a new trial situation?" [Id.] Thereafter, that same defense counsel referred the jury to the prior trial of Washington a dozen times. [See Exh. 1, pp. 22, 27-28; Major Jury Transcript, pp. 68, 69, 74, 78, 90, 91, and 94.]

rity about the possibility of spending the rest of his days in prison (which is not unlike any other defendant awaiting trial for murder); about how he has already been "severely punished" for this crime in his pre-trial ordeal. [Resp. Br. 21]; and how positive was the posture of his case in this second trial, i.e., no prosecution eye-witnesses, several exculpatory witnesses, and a defense alibi witness. [Id.] In truth, Washington's case in defense of the charge, which he planned to present to his second jury, was not substantially different from that in his first trial. [See Major Jury Transcript, pp. 55-95 for the outline of his case in opening statement.] His "alibi witness", James Hanrahan¹² was in actuality not going to testify, even

¹²This is the witness whose testimony the Arizona Supreme Court ruled

(Continued)

though defense counsel represented to the jury what this testimony would be. [See App. 196-198, where Mr. Butler argues to the trial court that Hanrahan had not been disclosed as a witness to the prosecution, had not been mentioned to the jury during voir dire as had Washington's other witnesses, had not been subpoenaed to be a witness even though Mr. Butler told defense counsel his whereabouts; and the evasive answers of defense counsel when asked if Hanrahan had been subpoenaed.] And although Washington tells this Court "[t]he prosecution had no eyewitnesses" [Resp. Br. 21], the State was, in this second trial, going to present

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the County Attorney suppressed from Washington at his first trial [See pp. 7-15, 35.]

Washington's accomplice, Alonzo Rodriquez, who was at the scene of the crime.¹³

So Washington's plea to this Court that his "right" to go to that jury was of inestimable "value" is not to be believed. If it were so important for Washington to have that jury decide his fate, as he argues now to this Court, why did not his defense counsel stand up before the trial judge and say so? Instead, he argued the propriety of his remarks. No where in the transcript of Washington's second trial is there found such a compelling plea to the trial judge to let Washington continue with his jury. Perhaps the truth is that the defense's

¹³This accomplice did not testify in Washington's first trial because he remained at large until October 1974. [Major Jury Transcript, p.91.]

case, not the prosecution's case as Washington maintains [Resp. Br. 22], was weakening, and he needed "time between trials to strengthen his case."

The declaration of a mistrial did not prejudice Washington. A new trial was immediately scheduled for January 14, 1975, four days after Judge Buchanan's ruling.[App. 272.] Thereafter, Washington began his quest for appellate relief which has brought this case to the Supreme Court. Contrary to Washington's meaningless assertions in his Brief [Resp. Br. 21-22], there was no prosecutorial manipulation. In such a situation as presented by the record in the case at bar, where the mistrial is not attributable to prosecutorial or judicial overreaching, the defendant, George Washington, Jr., is barred from relying on a double jeopardy

defense. United States v. White, 524 F.2d 1249, 1252 (5th Cir. 1975); United States v. Dinitz, supra, 424 U.S. at 611, 96 S.Ct. at 1082.

IV

WHEN A TRIAL JUDGE FEARS THE
POSSIBILITY OF JURY PREJU-
DICE AND HE DECLARES A MIS-
TRIAL THEREFOR, THERE IS NO
FACTUAL OR LEGAL NEED TO MAKE
A RECORD OF CONSIDERED
ALTERNATIVES.

Washington argues in support of the Ninth Circuit's holding that when a mistrial circumstance is (asserted to be) occasioned by jury prejudice, a trial judge should make a record of the considered alternatives to mistrial. [Resp.

Br. 23-24.]

As developed in the State's Brief to this Court, Washington's suggestion is contrary to established law in the Third, Fourth, Fifth, and Eighth Circuits.¹⁴ These circuits adhere to the principle

¹⁴ The following pertinent cases are explained in detail in the State's Brief at pp.129-141; United States v. Chase, 372 F.2d 453 (4th Cir. 1967), United States v. Smith, 390 F.2d 420 (4th Cir. 1968), United States v. Pridgeon, 462 F.2d 1094 (5th Cir. 1972), Whitfield v. Warden of the Maryland House of Correction, 486 F.2d 1118 (4th Cir. 1973), United States v. Hewitt, 517 F.2d 993 (3rd Cir. 1975), United States v. Barclift, 514 F.2d 1073 (9th Cir. 1975), Parker v. United States, 507 F.2d 587 (8th Cir. 1974); United States v. Walden, 448 F.2d 925 (4th Cir. 1971).

that when the possibility of juror prejudice exists, a trial judge is not required to explore (1) whether the jury has in fact become biased, and (2) whether alternatives to mistrial exist. In the absence of clear abuse, there is an apparent and special deference paid to a trial judge's exercise of discretion in the atmosphere of an influenced jury: the degree of influence is a subtle matter and best left to his perception. Therefore, if case law does not require a trial judge to canvass alternatives, it is illogical to demand that considered alternatives be expounded upon the record--there may be none.

Washington suggests that explicit findings of considered alternatives on the record will make the appellate court's

task a simpler one, with resulting fairer analysis. Such an approach misconceives the purposes of the double jeopardy provision and without warrant transforms the reviewing process into a checklist of the record. The appellate court should do what it has always done in a mistrial circumstance--scrutinize the facts of the case before it to determine if the trial judge could have found a manifest need to declare a mistrial.

V

THE ISSUE OF DELIBERATE
DEFENSE PROVOCATION OF
A MISTRIAL IS MOST PRO-
PERLY BEFORE THIS COURT

Washington finally argues to this

Court that the issue of deliberate defense provocation is being raised for the first time by the State, "notably" not having been "raised or claimed in Arizona Superior Court, the Arizona Supreme Court, the United States District Court or the United States Court of Appeals [for the Ninth Circuit]". [Resp. Br. 25.] Inconsistent with this argument, he then tells this Court that the issue was argued by the State to the Ninth Circuit, but was not there submitted for consideration. Two portions of the State's Brief which Washington infers merely allude to this issue are cited in his Brief [Resp. Br. 26] for the contention that the Ninth Circuit was not presented with the issue by the State.

In opposition to Washington's assertion, the State specifically refers this Court to pages 44, 45, 48, 55, 61,

and 64-68 where the State makes crystal-clear their position that defense counsel engaged in a course of conduct calculated to improperly prejudice the jury against the state, and which circumstance left the County Attorney with little choice but to request a mistrial.

CONCLUSION

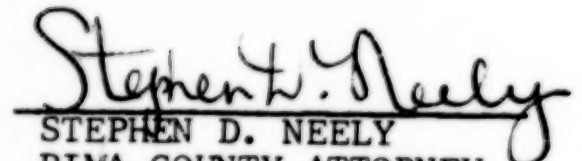
George Washington, Jr. quite naturally has denied that the circumstances of his second trial established "manifest necessity" or that the mistrial served "the ends of public justice" such as is necessary to prevent the Double Jeopardy Clause from barring his reprosecution. *United States v. Perez*, supra. The State believes that the avoidance of requiring the government to submit its case to a jury which had been improperly influenced against it during the course of a criminal trial is one of the legitimate ends of public justice which allows a mistrial upon the prosecutor's request, and does not prevent the defendant from being reprosecuted. *Illinois v. Somerville*, 410 U.S. at 464, 93 S.Ct. at 1070; Simmons v. United States, 142 U.S. 148, 154; 12

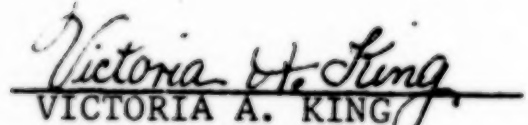
S.Ct. 171, 172, 35 L.Ed. 968 (1891).

Therefore, the State respectfully submits this Brief in Reply to Washington's several arguments.

DATED this 27th day of October, 1977.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY


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PIMA COUNTY ATTORNEY


VICTORIA A. KING
SPECIAL DEPUTY

STATE OF ARIZONA)
) SS:
County of Pima)

I, VICTORIA A. KING, hereby certify that I have served a copy of the foregoing Reply Brief for the Petitioner upon Respondent George Washington, Jr., by personally delivering three copies of the same to (1) Edward P. Bolding, Esq., La Placita Village, Suite 402, Toluca Building, P.O. Box 70, Tucson, Arizona 85702, and (2) Frederick S. Klein, Esq., 306 Pioneer Plaza Building, 100 North Stone Avenue, Tucson, Az 85701, attorneys for Respondent, this 27th day of October, 1977.

Victoria A. King
VICTORIA A. KING

SUBSCRIBED AND SWORN TO before me this 27th day of October, 1977, by VICTORIA A. KING.

Dorothy P. Hillgrom
Notary Public
My Commission Expires:
6-16-78